TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 118.

NORTON MARSHALL, APPELLANT,

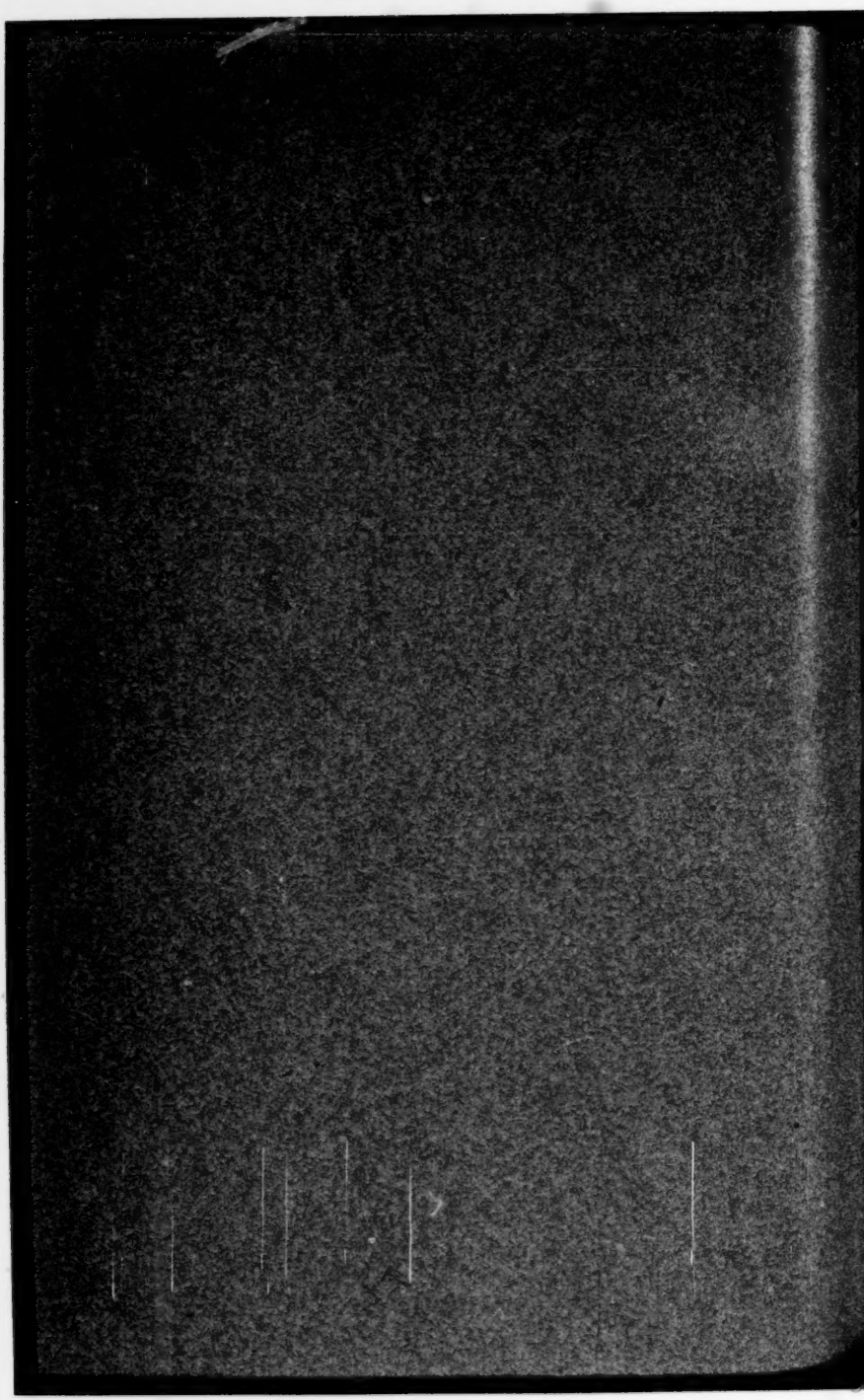
vs.

PETER T. BURTIS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED MAY 27, 1897.

(16,601.)



(16,601.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 388.

NORTON MARSHALL, APPELLANT,

vs.

PETER T. BURTIS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original.	Print.
Clerk's certificate	*a*	1
Transcript from district court	1	1
Summons	1	1
Sheriff's return	2	2
Complaint	3	2
Demurrer and answer	7	4
Amended answer	8	4
Answer to cross-complaint	11	6
Order setting cause for hearing	13	6
Order transferring cause to Yuma county	13	6
Order transferring cause to Maricopa county	14	6
Order setting cause for hearing	15	7
Order taking cause under advisement	15	7
Order to file briefs	16	7
Order for judgment	16	7
Judgment	16	8
Motion for new trial	19	9
Order overruling motion for new trial, &c	20	9
Bond on appeal	20	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1897.

	Original.	Print.
Bill of exceptions	24	11
Motion for new trial	25	11
Motion overruled and exceptions thereto	26	12
Testimony of E. H. Weiger	27	12
William Neahr	35	16
Plaintiff's Exhibit A—Deed from David Neahr to Friday M. Neahr, May 9, 1882	39	17
B—Deed from Friday M. Neahr to Peter T. Burtis, October 14, 1892	42	19
Testimony of Samuel Purdy	45	20
E. H. Weiger (recalled)	49	22
Plaintiff rests	50	22
Testimony of Mrs. Trinidad Muzzy	51	23
Eliza Weber	58	26
Jules Gheldof	60	27
Mrs. Mary E. Post	63	29
Defendant's Exhibit B—Copy of baptismal record	66	30
Testimony of Jules Gheldof (recalled)	68	31
Mrs. Downey	69	32
Mrs. Rosa Silva	73	34
Jules Gheldof (resumed)	78	36
Caroline McIntyre	78	36
Mrs. Conception Nailor	80	37
Miss Mary E. Post	83	38
O. F. Townsend	88	41
C. H. Brinley	91	42
Freeson Neahr	94	43
Defendant's Exhibit C—Letter, William Neahr to Norton Marshall, September 22, 1892	98	45
Plaintiff's Exhibit D—Note, Marshall to Mary F. Neahr, October 20, 1894	101	47
Testimony of James Neahr	102	47
Mary Fido Neahr	103	48
Defendant's Exhibit G—Letter, Friday M. Neahr to Norton Marshall, October 7, 1895	109	51
Testimony of Mrs. Mary E. Post (recalled)	114	54
Mrs. Naylor	118	56
H. C. Davis	120	56
Mrs. Luz R. Balsz	120	57
Defendant's Exhibit D—Deed from Friday M. Neahr to Norton Marshall, October 20, 1894	123	58
Testimony of J. W. Walker	126	60
Defendant's Exhibit F—Letter, William Neahr to Norton Marshall, June 13, —	128	61
Letter, William Neahr to Norton Marshall, October 4, 1892	128	61
G—Letter, William Neahr to Norton Marshall, September 29, 1892	129	62
Plaintiff's Exhibit G—Affidavit of Freedom Neahr	131	63
Testimony of Norton Marshall	133	64
P. K. Hickey	137	66
J. W. Walker	140	67

	Original.	Print.
Judge's certificate to bill of exceptions	141	68
Stipulation as to bill of exceptions	141	68
Assignment of errors	142	68
Clerk's certificate as to demand for transcript	146	70
Clerk's certificate to transcript	146	70
Clerk's certificate of costs	147	70
Endorsement on transcript	148	71
Order granting time to file briefs	149	71
Order setting cause for hearing	149	71
Order as to hearing and submission	150	71
Judgment	150	71
Petition for rehearing	151	72
Appearance for appellee on rehearing	154	73
Order submitting petition for rehearing	155	73
Order denying petition for rehearing	155	73
Affidavit of value	155	74
Petition for appeal	157	74
Bond on appeal	158	75
Order for supersedeas	161	76
Assignment of errors	162	77
Citation	166	78
Acceptance of service of citation	167	79

a SUPREME COURT } ss:
Territory of Arizona, }

—, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify the annexed instrument to contain a full, true, and correct transcript of all the record in the case of Norton Marshall, appellant, against Peter T. Burtis, appellee, in the supreme court of said Territory of Arizona, and I further certify that no opinion has been filed by said supreme court in said cause up to this date, and that the citation hereunto annexed is the original citation issued in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of Arizona, at Phœnix, the capital of Arizona, this 13th day of May, 1897.

[Seal Supreme Court of Arizona.]

J. L. B. ALEXANDER, *Clerk.*

1 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

PETER T. BURTIS, Plaintiff,
vs.
NORTON MARSHALL, Defendant.

Action brought in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona to Norton Marshall, defendant, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons, if served in this said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above
2 mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and seal of the district court of the third judicial district of the Territory of Arizona in and for Maricopa county this 18th day of December, A. D. 1894.

J. E. WALKER,
Clerk of said District Court,
By LEWIS JORDAN,
Deputy Clerk.

[Seal District Court.]

(Endorsed.)

OFFICE OF THE SHERIFF OF THE COUNTY OF MARICOPA.

I hereby certify that I received the within summons on the 18th day of December, A. D. 1894, at the hour — 2.30 p. m., and personally served the same on the 19th day of December, A. D. 1894, on Norton Marshall, being the defendant named in said summons, by delivering to him, at Phœnix, county of Maricopa, Arizona Ty., a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons.

Dated this 19th day of December, 1894.

J. K. MURPHY, *Sheriff*,
By J. W. DAVENPORT,
Deputy Sheriff.

Fees.

3	Services	$1 50
	Copies	60
	Travel, — miles	30
	Publication	
	Total	$2 40

Filed Dec. 19, 1894.

J. E. WALKER, *Clerk*,
By LEWIS JORDAN,
Deputy Clerk.

(Title of Court and Cause.)

Complaint.

The above-named plaintiff complains of the defendant above named, and for cause of complaint alleges:

(1.)

That plaintiff and defendant are both citizens of Maricopa county, Arizona Territory.

(2.)

That on the 14th day of October, 1892, one Firday M. Neahr, commonly known as Mary F. Neahr, was an unmarried woman, over the age of 21 years, and was seized in fee of the following-described premises in Maricopa county, Arizona Territory,
4 to wit: Lot 8, in block 1, in Neahr's addition to the city of Phœnix, according to the plat of said Neahr's addition on file in the office of the county recorder.

(3.)

That on said 14th day of October, 1892, said Friday M. Neahr sold and conveyed said premises above described to this plaintiff for the sum of fifteen hundred dollars, which plaintiff paid her therefor, and executed a good and sufficient deed to plaintiff of said premises,

and plaintiff thereupon became seized in fee of said premises, and entered into the possession thereof, and ever since has been the owner in possession and entitled to the possession thereof, except a portion of said premises, to wit, a piece of ground beginning on the west line of Yavapai St. a distance of 145 feet north of the southeast corner of said land and running from said point northerly along said line of said Yavapai St. 100 ft.; thence at right angles westerly 147 and ½ ft.; thence at right angles southerly 100 ft.; thence at right angles easterly 147 and ½ ft. to the place of beginning; which said premises last above described this plaintiff sold and conveyed to one Redmond Toohey on the 20th day of December, 1892, and executed thereupon to said Redmond Toohey a conveyance thereof, with full covenants of warranty, warranting the title of said land to said Toohey; and plaintiff avers that he is bound by said
5 deed to warrant and defend the title to said land so conveyed to said Toohey and his assigns.

(IV.)

Plaintiff avers that on or about the 25th day of October, 1894, the defendant, Norton Marshall, contriving to defraud this plaintiff and cloud plaintiff's title to the property above described, induced said Friday M. Neahr, by false and fraudulent pretenses and without consideration, to sign and acknowledge an instrument in writing the contents of which were unknown to the said Firday M. Neahr, which said instrument was a conveyance from said Friday M. Neahr to said Norton Marshall of the same premises and land previously conveyed, as heretofore set forth, to this pl'ff by said Friday M. Neahr, and in said instrument in writing said Friday M. Neahr was fraudulently induced to make the false statement that she was not of lawful age when she executed the conveyance to the plaintiff of Oct. 14th, 1892, hereinbefore referred to; that said instrument so fraudulently and falsely procured from said Friday M. Neahr by the def't was thereafter and on the 29 day of October, 1894, presented by the defendant herein to be recorded, and was at his request recorded, in the office of the county recorder of Maricopa county, A. T.; all to the great injury of this plaintiff in the sum of five thousand dollars.

(V.)

6 That said instrument in writing and the record thereof acts as a cloud upon the title of plaintiff and of plaintiff's grantee to said lands and premises, and interferes with their enjoyment thereof, and that plaintiff is without remedy at law in the premises.

(VI.)

Wherefore plaintiff prays judgment against the d'f't that it be declared that said instrument and the record thereof be adjudged invalid, and that the d'f't be ordered to deliver up said instrument for cancellation and that the same be cancelled, and that it be adjudged that d'f't has no claim, title, or right by virtue of said in-

strument in or to the premises in said instrument described or any part thereof, and that pl'ff have damages against d'f't in the sum of $5,000, and that pl'ff have such other, further, and different relief in the premises as equity and good conscience call for, and for costs.

FITCH & CAMPBELL,
Att'ys for Pl'ff.

(Endorsed:) Filed Dec. 18, 1894, at 2.20 p. m. J. E. Walker, clerk, by Lewis Jordan.

7 (Title of Court and Cause.)

Demurrer and Answer.

Now comes defendant above named and demurs to the complaint of plaintiff, and for ground of demurrer shows that said complaint does not state facts constituting a cause of action.

And, for further defense and answer to said complaint, defendant denies each and every allegation contained in said complaint, excepting the allegations herein specifically admitted, to wit:

That on the 14th day of October, 1894, Friday M. Neahr was unmarried and seized in fee of the premises described in plaintiff's complaint, but defendant denies that said Friday M. Neahr was on said 14th day of October, 1892, of the age of 21 years, or more than 19 years of age.

Wherefore defendant asks that plaintiff take *to*thing; that said complaint be dismissed and defendant have judgment against plaintiff for costs expended and incurred herein.

THOS. ARMSTRONG, JR., AND
ALEXANDER & STILWELL,
Attorneys for Defendant.

(Endorsed:) Filed December 22nd, 1894. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

8 (Title of Court and Cause.)

Amended Answer.

Comes now the defendant, Norton Marshall, and for his amended answer to the plaintiff's complaint herein shows to the court and alleges:

First. That he admits that the plaintiff and the defendant are both citizens of Maricopa county, Arizona Territory.

Second. The defendant also admits that on the 14th day of October, 1892, one Friday M. Neahr, commonly known as Mary F. Neahr, was an unmarried woman and was seized in fee of the premises described in the plaintiff's complaint, with limitation, however, that the same should not be disposed of during her minority.

Third. The defendant further shows that on the said 14th day of October, 1892, the said Friday M. Neahr, by an instrument in writing then by her executed, attempted to sell and convey said prem-

ises to the plaintiff, P. T. Burtis, and that thereafter the plaintiff entered into possession of said premises and is now in such possession, except as to that portion thereof alleged in his complaint to have been sold by him to Redmond Toohey.

9 Defendant admits that he did, on or about the 25th day of October, 1894, obtain from the said Friday M. Neahr a deed to the premises and property described in the plaintiff's complaint, and did, on the 29th day of October, 1894, cause the same to be duly recorded in the office of the county recorder of said Maricopa county.

Further answering, the defendant denies each and every allegation, matter, and thing in the plaintiff's complaint contained not hereinabove specifically admitted or denied; and for cross-complaint the defendant alleges that on the 14th day of October, 1892, the day of the date and the date whereon the deed described in the plaintiff's complaint was executed by Friday M. Neahr to the plaintiff, the said Friday M. Neahr was an infant under the age of twenty-one years, to wit, of the age of nineteen years, and incapable of contracting in relation to or conveying any real estate to her belonging; all of which the plaintiff well knew at and before the time said deed was executed and delivered to him.

The defendant further shows that said Friday M. Neahr derived her title to said premises solely by a deed of gift from her father, David Neahr, and it was in and by said deed of gift expressly provided and limited that said Friday M. Neahr should have no

10 power of disposition of said premises prior to the time she should arrive at the age of twenty-one years; all of which the plaintiff well knew at the time he received his said alleged deed of conveyance thereof from the said Friday M. Neahr, as aforesaid; that on the 7th day of September, 1894, the said Friday M. Neahr attained her majority and became of the full age of twenty-one years, and on the 24th day of October, 1894, the said Friday M. Neahr executed, acknowledged, and delivered to this defendant, for a valuable consideration then and there paid to her by the defendant, a deed of conveyance in writing, with full covenants of *season* and warranty, conveying to this defendant the lands and premises described in the plaintiff's complaint herein, and therein and thereby said Friday M. Neahr expressly revoked and disaffirmed the aforesaid attempted conveyance of said premises to the plaintiff, and this defendant thereupon became, ever since has been, and now is the lawful owner of said premises and the whole thereof and entitled to possession thereof; that said plaintiff has no right, title, claim, or interest whatsoever in said premises, and the claim of the plaintiff to ownership thereof is without foundation and against the rights of this defendant, and is a cloud upon the title of this defendant to the said premises.

Wherefore the defendant prays that the plaintiff's alleged

11 deed to said premises, dated the 14th day of October, 1892, be by the judgment of this court declared invalid and of no effect, and that the plaintiff be perpetually enjoined and restricted from setting up or making any claim to or upon said premises, and that all such claims be quieted and this defendant be adjudged and

declared the owner of said premises, and of right entitled to the possession thereof against any claim of the plaintiff thereto, and that he have judgment for his costs herein.

Dated October 11th, 1895.

W. H. STILWELL,
THOS. ARMSTRONG, JR.,
Att'ys for Def't.

(Endorsed:) Filed this 21st day of October, 1895. C. H. Kinsley, clerk. Filed October 12th, 1895. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

(Title of the Court and Cause.)

Answer to Cross-complaint.

Comes plaintiff and, replying to defendant's cross-complaint, denies all and singular the allegations thereof, excepting that
12 plaintiff claims an interest in said premises, and plaintiff avers that he is the owner thereof by virtue of the conveyance to him and set forth in his complaint filed herein.

FITCH & CAMPBELL,
Att'ys for Pl'ff.

(Endorsed:) Filed this 21st day of Oct., 1895. C. H. Kinsley, cl'k 3rd dist., Yuma Co. Filed May 28th, 1896. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

13 *Minute Order of October 3rd, 1895.*

(Title of Court and Cause.)

Ordered by the court that this cause be set for trial on Tuesday, October 15th, 1895.

Minute Order of October 14th, 1895.

(Title of Court and Cause.)

On motion of defendant's counsel, it is ordered by the court that this cause be transferred to the district court of third judicial district, Territory of Arizona, in and for the county of Yuma, for trial, as per stipulation filed herein.

14 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Yuma

PETER T. BURTIS, Plaintiff,
vs.
NORTON MARSHALL, Defendant.

It being stipulated by Fitch and Campbell, for plaintiff, and Thos. Armstrong, Jr., for defendant, their respective attorneys, that the

order changing said cause from this court to the district court of Maricopa county be entered "*nunc pro tunc*" as of date of October 21st, 1895, it is so ordered.

Yuma, November 9th, 1896.

(Signed) A. C. BAKER, *Judge.*

I hereby certify that the foregoing is a full, true, and correct copy of an order made and entered in the above-entitled action on Monday, the 9th day of November, 1896, in open court, and so recorded in the minutes thereof.

In witness whereof I have hereunto set my hand and the seal of said court this 11th day of December, 1896.

[Seal of District Court, Yuma County.]

C. H. KINSLEY, *Clerk.*

15 (Endorsed:) Filed Dec. 12th, 1896. J. E. Walker, clerk.

Minute Order of December 19th, 1895.

(Title of Court and Cause.)

Argument of this cause set for hearing Monday, December 23rd, 1895.

Minute Order of December 23rd, 1895.

(Title of Court and Cause.)

The argument in this cause came regularly on to be heard by the court, Messrs. Fitch & Campbell appearing for the plaintiff and defendant appearing by his counsel, Thos. Armstrong, Jr., and William H. Stilwell, Esq. Cause was argued to the court by counsel and submitted on briefs to be presented.

16 *Minute Order of May 6th*, 1896.

(Title of Court and Cause.)

It is ordered by the court that both parties file briefs forthwith, and case thereupon to be finally submitted.

Minute Order of May 28th, 1896.

(Title of Court and Cause.)

This cause having heretofore been tried, argued, and submitted, now, on this day, after due consideration and being fully advised in the premises, it is ordered by the court that judgment be entered for the plaintiff, as prayed for in his complaint.

Judgment.

(Title of Court and Cause.)

This cause came on regularly for trial before the court, sitting without a jury, Fitch & Campbell appearing for the plaintiff
17 and Thomas Armstrong, Jr., and W. H. Stilwell appearing for the defendant. Evidence upon behalf of the respective parties was introduced and the cause was submitted to the court for its consideration and decision, and, after due deliberation, the court orders that plaintiff have judgment.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that the plaintiff, Peter. T. Burtis, is the owner of the following-described real estate, situate in Maricopa county, Arizona Territory, to wit, all of lot number eight (8), in block number one (1), of Neahr's addition to the city of Phœnix, according to the plat thereof on file in the office of the county recorder of Maricopa county, Arizona, excepting that portion of said premises described as follows: Beginning on the west line of Yavapai street (or Seventh avenue) a distance of 145 feet north of the southeast corner of said land and running from said point northerly along said line of Yavapai street 100 feet; thence at right angles westerly 147½ feet; thence at right angles southerly 100 feet; thence at right angles easterly 147½ feet to the place of beginning, being the premises conveyed by plaintiff to one Redmond Toohey on December 20th, 1892, and that said defendant, Norton Marshall, is not the owner of said lot number eight (8), in block number one (1), of Neahr's addition or of any part thereof, and that the deed of said
18 premises heretofore executed by Friday Mary Neahr to said Norton Marshall, of date October —, 1894, and recorded on the 29th day of October, 1894, in Book 37 of Deeds, page 55, in the office of the county recorder of said county of Maricopa, is invalid and of no effect, and the same is hereby annulled and cancelled, and the said defendant, Norton Marshall, has acquired no claim, title, or right by virtue of said deed in or to the premises described therein, to wit, said lot number eight, in block number one (1), of said Neahr's addition to the city of Phœnix, and said defendant is hereby forever restrained and enjoined from asserting any claim or title to said premises or any part thereof by virtue of said deed.

And it is further ordered, adjudged, and decreed that said defendant, Norton Marshall, take nothing by his cross-complaint filed herein, and that said plaintiff, Peter T. Burtis, do have and recover of and from the said defendant, Norton Marshall, his costs and disbursements herein, taxed at $53.30.

Done in open court May 28th, 1896.

A. C. BAKER, *Judge.*

(Endorsed:) Filed May 28th, 1896, at 9.30 o'clock a. m. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

19 *Motion for New Trial.*

(Title of Court and Cause.)

Comes now Norton Marshall, the defendant in the above-entitled action, and moves the court that the judgment of the court herein be set aside and a new trial granted herein, upon the following grounds, to wit:

1. Upon the ground that the court erred in admitting incompetent evidence on the part of the plaintiff, over the objection of the defendant, and in rejecting competent evidence offered by the defendant.

2. Upon the ground that the evidence in this cause does not sustain the judgment herein.

3. That the judgment is contrary to law.

Dated May 29th, 1896.

THOS. ARMSTRONG, JR.,
W. H. STILWELL,
Attorneys for Defendant.

(Endorsed:) Filed May 29th, 1896. J. E. Walker, clerk.

20 *Minute Order of June 23rd, 1896.*

(Title of Court and Cause.)

The motion for a new trial in this cause was presented and by the court overruled. Defendant excepts and gave notice in *upon* court of an appeal from the judgment and order overruling motion for a new trial to the supreme court of the Territory of Arizona.

Bond on Appeal.

(Title of Court and Cause.)

Know all men by these presents that we, Norton Marshall, as principal, and J. W. Walker and Neil McIntyre, as sureties, all of the county of Maricopa and Territory of Arizona, are held and firmly bound unto Peter T. Burtis, the plaintiff and appellee above named, in the penal sum of three hundred dollars ($300), lawful money of the United States; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25 day of July, 1896.

21 The condition of the above obligation is such that whereas on the 28th day of May, 1896, the above-named plaintiff and appellee did recover judgment in the above-entitled cause and court against the said defendant and appellant, adjudging, ordering, and decreeing "that the plaintiff, Peter T. Burtis, is the owner of the following-described real estate situate in Maricopa county, Arizona Territory, to wit, all of lot number eight (8), in block number one

(1), of Neahr's addition to the city of Phœnix, according to the plat thereof on file in the office of the county recorder of Maricopa county, Arizona, except that portion of said premises described as follows: Beginning on the west line of Yavapai street (or Seventh avenue) a distance of 145 feet north of the southeast corner of said land and running from said point northerly along said line of Yavapai street 100 feet; thence at right angles westerly 147½ feet; thence at right angles southerly 100 feet; thence at right angles easterly 147½ feet to the place of beginning, being the premises conveyed by plaintiff to one Redmond Toohey on December 20, 1892, and that said defendant, Norton Marshall, is not the owner of said lot number eight (8), in block number one (1), of Neahr's addition or of any part thereof, and that the deed of said premises heretofore executed by Friday Mary Neahr to the said Norton Marshall, of date October —, 1894, and recorded on the 29th day of Octo-
22 ber, 1894, in Book 37 of Deeds, page 55, in the office of the county recorder of said county of Maricopa, is invalid and of no effect, and the same is hereby annulled and cancelled, and the said defendant, Norton Marshall, has acquired no claim, title, or right by virtue of said deed in or to the premises described therein, to wit, said lot number eight, in block number one (1), of said Neahr's addition to the city of Phœnix, and said defendant is hereby forever restrained and enjoined from asserting any claim or title to said premises or any part thereof by virtue of said deed.

"And it is further ordered, adjudged, and decreed that said defendant, Norton Marshall, take nothing by his cross-complaint filed herein, and that said plaintiff, Peter T. Burtis, do have and recover of and from the said defendant, Norton Marshall, his costs and disbursements herein, taxed at $53.30."

Which judgment was duly entered in said court on said 28th day of May, 1896, and recorded in Judgment Book "E," on page 379 thereof.

And whereas the said defendant and appellant has duly given notice in open court of appeal from said judgment to the supreme court of the Territory of Arizona, and is now desirous of perfecting his appeal, and the clerk of said court has fixed the amount
23 of the bond to be given thereon in the sum of three hundred dollars ($300);

Now, therefore, if said Norton Marshall, defendant and appellant, shall prosecute his said appeal with effect and shall pay all costs which have accrued in the said district court or which may accrue in the appellate court in said cause, then this obligation to be of no effect; otherwise to be and remain in full force and effect.

NORTON MARSHALL. [SEAL.]
J. W. WALKER. [SEAL.]
NEIL MacINTYRE. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

J. W. Walker and Neil McIntyre, being first duly sworn, do*th* depose and say, each for himself, and not one for the other, that he

is a resident and freeholder within said county of Maricopa and Territory of Arizona and is worth the sum of three hundred dollars ($300) over and above his just debts and liabilities, exclusive of property exempt from execution.

J. W. WALKER.
NEIL MacINTYRE.

Subscribed and sworn to before me this 25th day of July, A. D. 1896.

[NOTARIAL SEAL.] THOS. ARMSTRONG, JR.,
Notary Public.

24 (Endorsed:) Approved and filed July 25th, 1896. J. E. Walker, clerk, by C. H. Knapp, deputy clerk.

(Title of Court and Cause.)

Be it remembered that the above-entitled cause, being at issue at the May, 1896, term of said court, was argued and submitted to the court for decision upon the evidence offered by the plaintiff and defendant therein (said evidence having been partially taken before the court and the remainder before Chas. H. Holmes, Esq., as referee, by order of the court), all the evidence having been taken down by Chas. Holmes, the official court stenographer, and written out at length by him and afterward reduced to narrative form, and the whole thereof so reduced to narrative form being annexed to and incorporated in this bill of exceptions, with the several objections made thereto by the respective parties, together with
25 the rulings of the court thereon and the exceptions thereto, if any, taken.

That said action was decided and judgment ordered for the plaintiff therein by the said court on the 28th day of May, 1896, to which order for judgment the defendant then and there duly excepted, and judgment was duly entered therein on said day and during said May, 1896, term, and the defendant during said term and on the 29th day of May, 1896, duly filed and served upon the plaintiff his motion for a new trial; which motion for new trial is as follows, to wit:

(Title of the Court and Cause.)

Comes now Norton Marshall, the defendant in the above-entitled action, and moves the court that the judgment of the court herein be set aside and a new trial granted herein upon the following grounds, to wit:

1. Upon the ground that the court erred in admitting incompetent evidence on the part of the plaintiff over the objection of the defendant, and in rejecting competent evidence offered by the defendant.

2. Upon the ground that the evidence in this cause does not sustain the judgment herein.

3. That the judgment is contrary to law.

26 Dated May 29th, 1896.

THOS. ARMSTRONG, JR.,
W. H. STILWELL,
Attorneys for Defendant.

Filed May 29, 1896.

Which motion for new trial was overruled by the court on the 24th day of June, 1896; to which ruling the defendant then and there and during said term duly excepted, on the 24th day of June, 1896.

Be it further remembered that defendant, by his attorney, then and there, and on said 24th day of June, 1896, gave notice of appeal to the supreme court of the Territory of Arizona from said judgment rendered and entered in said action, and from the order overruling defendant's motion for a new trial.

Defendant now appears, by his attorney, Thos. Armstrong, Jr., and embodies his exceptions to the rulings of the court upon the trial of said cause and to the ruling of the court in overruling defendant's motion for a new trial, and all of the evidence taken on said trial, in this bill of exceptions, and lodges the same with the clerk of said court, and presents the same to the Hon. A. C. Baker, the judge before whom said cause was tried, to be allowed,

27 settled, and signed by said judge on this 21st day of November, 1896, and during said May, 1896, term of said court.

THOS. ARMSTRONG, JR.,
Attorney for Defendant, Norton Marshall.

(Title of Court and Cause.)

Bill of Exceptions—Evidence and Exceptions Thereto.

Mr. E. H. WEIGER, a witness duly called and sworn on behalf of plaintiff, was examined and testified as follows, to wit:

I reside in Patraro, in California. I have resided in this city for upwards of 20 years, immediately before I went to California—that is, in Yuma, Yuma county, Arizona. I first came to Yuma county shortly after the close of the war, in 1866 or 1867, and from that time I lived in Yuma county until 1873. I knew David Neahr and his family during that time and I knew where his family residence was; it was in Yuma. I don't know the names of the streets now. I was his nearest neighbor in 1871. I was married

28 then and lived in a house adjoining his. I don't know the lot on which they resided; I know the location, but I don't know the names of the streets. The houses are not the same; they were all washed away by the flood. During the time I lived near him I knew of the birth of a female child to David Neahr; that was in 1871; that was in the house next to the one in which I lived, and I was then his nearest neighbor. The name of the child was Mary, I believe. There was another female child in the family named Fannie; there was no others. Fannie was born at the time

of Mary's birth; she was a number of years older than Mary. I left this Territory in 1873. The name of this village at that time was Arizona City; there was no such thing as the village of Yuma then. I have not lived here since 1873. I have never seen Mary Neahr since. At the time I was here I was clerk in the employ of William B. Hooper. My present occupation is merchandizing, farming, and hotel-keeping. There is a fact or circumstance that enables me to remember the year that Mary Neahr was born. Some time previous to the time William B. Hooper was going out of the retail business a proposition came from the head of the firm that they would have me appointed treasurer for the Colorado reservation of Mohave Indians, and an application was handed to me to make out the application and I copied it in my own
29 handwriting, as it was necessary that they should see my handwriting; so I was very busy that day, and I made a rough copy of the application, intending in the evening, when I had more time and leisure, to copy it off more carefully, and I have that original copy in my possession now, and that is the date, in 1871. This brings the recollection of the birth of Mary Neahr to me, because I was then living in the Speer house, adjoining Mr. Neahr's, at that time. We occupied that house in that year. I was living in that house at the time I made out this application. Mary Neahr was born during that summer, after the writing of this application: it was during hot weather; some time between, probably, June and September. It might have been as late as the first of September, because in those years we had sometimes very hot weather in September, and I know it was hot weather. I know it because the mother brought the child over to my house. It was noon and I was at home for dinner, and she was there with the child. The application that I made out did not show the month or the day it was made out, because it was necessary to put in the date that I handed it in, but the year and the rest of it is there. I think we moved out of the Speer house in the fall after I made this application—in the fall of 1871. I went from there over to a house I had on
30 Gila street. I lived on Gila street, I think, about a year. My child was born there, in that house on Gila street; that was a girl child; she was born the next May—that is, the following year, 1872. She was born after I left the Speer house. The Speer house was next to the Neahr house, next door, and Mary Neahr was born while I was living in the Speer house. I next built another house here, where Mr. Gandolfo now lives. I sold it to Mr. Gandolfo. I lived there about another year, and from there we moved to Santiago, and I have never lived here since that time. I have a memorandum or copy of that application I spoke of in my room at the hotel, in my valise. I can produce it if I have time to go for it.

Cross-examination.

By Judge STILWELL:

My full name is E. H. Weiger. I moved from Yuma to Santiago late in the fall. I moved from the house near Mr. Neahr's to the

house on Gila street, I think, in the fall, although I have not a distinct recollection about it, but I think it was in the fall. I have a distinct recollection about those changes of residence, but whether it was late in the fall or right at the beginning of the winter time, I am not sure. I think it was late in the fall—in the fall of 1871.

I am quite sure about that. I couldn't be a month out of the
31 way. That was after I made the application for this position.

I don't remember how many months after. I don't remember exactly the date, but I think it was somewhere in January, the time I made this application. It might have been as late as September, 1871, the first of September, that I moved to Gila street to reside, possibly. The particular event that I can recall after I removed from my residence, near Mr. Neahr's, to the Gila Street house, is the birth of my daughter. I do not recollect any other births, particularly after removing to that place on Gila street. I fix the date of the birth of this Neahr child in 1871—in the summer of 1871, during warm weather. I did not testify in my examination-in-chief that the birth of this child occurred after I removed from my place of residence near Mr. Neahr's. His child was born while we lived there, and my daughter was born after we got to the Gila Street house. I don't think I ever saw the Neahr family after I removed from Yuma, in 1873. I may have seen the boys. I came back on business; that was the yeer that the railroad got in here. I think I left here the day that they got into Mr. Yager's place. I remained here, I think, 5 or 6 days at that time. I think I remember seeing the Neahr boys at that time. That was when the railroad

got into Yager's. I don't know what year that was. I don't
32 know which one of the Neahr boys I saw at that time. I

have a recollection of seeing one of the boys on the street at the store—at Mr. Neahr's store. I don't know which one of the boys I saw. I don't remember the conversation I had with him. I simply saw him passing. I couldn't tell exactly how old he was at that time. I recollect that it was a Neahr boy, because I think I am possessing ordinary intelligence. I know it was one of the Neahrs, without telling which one it was. I remember meeting other people on that day. I saw most everybody in town. I probably met the Neahr boys every day I was here. That is not simply a matter of opinion with me. I cannot tell the location where I met a Neahr boy excepting this one time. I did not have a conversation with them and I cannot tell which one I saw. I think the oldest one was in the store. That is the only Neahr that I have met and recognized since 1873. I do say that some one brought the Neahr child to my house one noon. I can recollect that child as having been brought there at noon because it was the first time that Mrs. Neahr was in the house, and she had just got up out of her sick bed, and she came to our house. I don't know as I have talked to any one about this matter before since this case came up. I first talked about it several months ago, but I don't believe I can fix the time when it was. It was in San-

tiago; I got a letter from Mr. Knight, and I dis-
33 cussed it in the house with my family. This is the first time this subject has been called to my attention since 1873.

I cannot fix the date of the receipt of that letter. I next received a letter from Mr. Knight two weeks ago. That was the next time I discussed it. I did not receive any letters from anybody else until I received that letter from Mr. Knight, only from conversation that I have had here. That is all I have received letters from. I have not got that letter here. Those letters did not mention the date on which it is claimed this child was born. I received those letters this year—the last one was this year. I saw the mother of that child after that time several times while I lived there. I don't know how often. I used to see her very frequently, sitting out there. Our families had become somewhat intimate in that time. She never visited us at the Gila Street house. I was about half a mile from them when I removed to the Gila Street house. I never saw her at my house after that. I am sure of this. She visited my house once before I moved to the Gila Street house; that is all. She may have been there, but that is all I remember. I am able to remember this child and the date of the child's birth from this one visit to my house in 1871, and without seeing any of the family or children since that time. I think that is all the babies I
34 remember being brought into my house in the year 1871; that is the only reason why I recollect it. I am able to say that that child was brought into the house in the same summer that I made out this application for this office because I saw this child there, and that is the only summer that I lived there, and I recollect that distinctly. I may be mistaken, but I am as positive about that as anything that I can be positive about. I am satisfied in my own mind that the evidence that I have given in this case is exactly as I believe it to be. I recollect that in the summer of 1871 I was employed with Hooper & Company. I recollect that in the summer of 1872 I built a bath-room attached to my house—the house that Mr. Gandolfo lives in. That was in 1872. In 1873 I used to go hunting every Sunday, pretty near. That is all I can state. That was a general habit of mine, and so I can testify to that as one of the things that I remember. For quite a while I used to hunt on Sundays, for I worked all the rest of the week. We had to work Sundays at first, and then after a while we closed the store up on Sundays and we all used to go off hunting. I don't think I remember how many children Mr. Neahr had in his family when this child Mary was born. I don't think I remember when any other children in the Neahr family were born. I heard of the birth of other children in the Neahr family, but nothing that
35 I can recollect particularly about. I think I recollect of other births in the Neahr family while I was living in the town of Yuma. That was afterwards, and before I left for Santiago. I recollect the fact that Fannie Neahr was born while I lived in Yuma. I don't recollect how long Fannie Neahr was born prior to the birth of Mary Neahr. I do not recollect particularly of any other birth in the Neahr family prior to the birth of Mary. I never heard this child called by any other name than by the name of Mary. I will go to my rooms and bring that paper of which I spoke.

Witness excused.

WILLIAM NEAHR, a witness called and sworn on behalf of plaintiff, was examined and testified as follows:

Examined by Judge CAMPBELL:

I am known by the name of Freeson Neahr. That is my signature (referring to written instrument handed witness). It was made on the 14th day of October, 1892, the date which it purports to have been made.

Q. And, to the best of your knowledge, Mary was of age at this time?

A. Yes, sir.

36 By Judge STILWELL: We object to that as suggestive and leading.

By the COURT: Yes; that is sustained.

A. I am a son of David Neahr and am a brother to Friday Neahr, commonly called Mary. My age is 37 years. I always understood father to say that Friday Neahr was born in 1871.

By Mr. ARMSTRONG: We object to that as hearsay.

I have heard my father talk about the age of the two girls.

By Mr. ARMSTRONG: We object to that as hearsay.

By Judge CAMPBELL: The witness is shown to be old enough to remember the event.

By the COURT: The objection is overruled.

By Mr. ARMSTRONG: Defendant excepts to the ruling of the court.

By the COURT: The statements of parents, I understand, is the rule, and they are admissible.

By Col. FITCH: That is all.

Cross-examination.

By Judge STILWELL:

I have a recollection of the birth of my sister Mary. She was born on the 25th of September.

Q. Have you any recollection of that particular year?

A. No, sir; only I have heard him talk about my sister
37 and my sister-in-law being born in the same year, only a few months apart.

By Mr. ARMSTRONG: Defendant objects to that as hearsay and it is not responsive to the question.

By the COURT: That is sustained; that will be stricken out.

By the WITNESS: I have no recollection of any other event happening about the time of the birth of my sister or during that summer. I remember where I lived at the time my sister was born; I lived then where I am living now. We lived there in 1868. Before that time we lived right where the pump is now. I remember of moving to where we now live. I remember of some one being hung in town here when I was a small boy, but I don't remember

the dates. I was not present at the hanging. I remember I had a sister Mary at the time the man was hung. I am sure of that. I can remember it because I know I had two sisters in the family. I don't remember who that man was that was hung. I didn't pay any particular attention to the hanging of the man. I didn't have any interest in it and was not present at the time. I remember he was hung here. I was about 18 or 16 years old. I was in school at that time. I know how old I am; I am 36 or 37 years old, but
38 I don't know which. I don't remember what day of the month my birthday is. I had it once, but I have lost it. I don't know what day of the month nor what day of the year. I don't remember whether my sister Mary was christened or baptized. None but one of us has been baptized. I know none of us was baptized excepting the one that was baptized 4 or 5 or 6 years ago. I know that because I heard it. I know there was none of us baptized. I never heard any one say that Mary wasn't baptized, but she never wanted to be baptized. I know she isn't baptized because she lives with me. I know she wasn't baptized when she was an infant, because her father never liked to have her baptized—that is, in the Catholic church—and we don't belong to no church. That is my reason for saying that Mary was never baptized. I don't think she was baptized when she was a little girl.

By the COURT: Is your mother living or dead?

A. My mother and father are both dead.

Witness excused.

Plaintiff here offered in evidence certified copy of a deed from David Neahr to Friday M. Neahr and a deed from Friday M. Neahr to Peter T. Burtis; which deeds were admitted in evidence as Plaintiff's Exhibits "A" and "B," copies of which are as follows, to wit:

39 (PLAINTIFF'S EXHIBIT "A.")

David Neahr
to
Friday M. Neahr.

This indenture, made the ninth day of May, in the year of our Lord one thousand, eight hundred and eighty-two, between David Neahr, of the county of Maricopa, the party of the first part, and Friday M. Neahr, daughter of grantor, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of love and affection borne the said party of the second part, does by these presents grant, bargain and convey unto the said party of the second part, and to her heirs and assigns forever all that certain lot, piece or parcel of land, situated and lying in the county of Maricopa, Territory of Arizona and described as follows, to wit: Same being in "Neahr's addition" to the city of Phœnix, as shown by Patrick's survey 1881 as appears of record and file in the county recorder's office in the county of Maricopa, said lots of

land being numbers eight (8) block one (1). The above grant is expressly made upon the following conditions, to wit: That the said land for lots are not to be disposed of or sold until the said party of the second part shall reach the age of twenty-one years, and in case of her death, before reaching said age, then the said property conveyed to reverted to the said party of the first part.

Together with all and singular the tenements, hereditaments
40 and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to her heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

DAVID NEAHR. [L. S.]

Signed, sealed, and delivered in the presence of—
H. N. ALEXANDER.

TERRITORY OF ARIZONA, } ss:
County of Yuma, }

On the ninth day of May, A. D. 1882, personally appeared before me, H. N. Alexander, a notary public in and for said county of Yuma, David Neahr, known to me to be the person described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed
41 my official seal the day and year in this certificate first above written.

[L. S.] H. N. ALEXANDER,
Notary Public.

Recorded at request of David Neahr May 11th, 1882, at 30 minutes past 11 a. m.

R. F. KIRKLAND,
County Recorder,
By E. S. KIRKLAND, *Deputy.*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. W. Kincaid, county recorder in and for the county and Territory aforesaid, hereby certify that I have compared the foregoing copy with the original record of a deed filed and recorded in my office on the 11th day of May, 1882, in Book No. 7 of Deeds, Records of Maricopa County, A. T., at pages 602, and that the same is a full, true, and correct copy of such original and of the whole thereof.

Witness my hand and seal of office this 14th day of Oct., 1895.

J. W. KINCAID,
County Recorder.

[RECORDER'S SEAL.]

Filed October 21st, 1895.

42 (PLAINTIFF'S EXHIBIT "B.")

Know all men by these presents that I, Friday M. Neahr, commonly known as Mary F. Neahr of the county of Yuma, Territory of Arizona, for and in consideration of the sum of fifteen hundred dollars lawful money of the United States of America to me in hand paid by Peter T. Burtis of the county of Maricopa Territory of Arizona the receipt whereof is hereby acknowledged do hereby grant sell and convey to the said Peter T. Burtis his heirs and assigns, that certain lot piece or parcel of land situate lying and being in the county of Maricopa Territory of Arizona and more particularly described as follows to wit: Lot number eight (8) in block number one (1) in Neahr's addition to the city of Phœnix, according to the plat of said Neahr's addition on file in the office of the county recorder of said county.

To have and to hold to the said Peter T. Burtis his heirs and assigns forever.

And I hereby covenant to warrant and defend the title to said premises to the said Peter T. Burtis his heirs and assigns forever against the lawful claims of every person claiming or to claim the same.

Witness my hand and seal this 14th day of October 1892.

FRIDAY M. NEAHR. [SEAL.]

43 TERRITORY OF ARIZONA, }
County of Yuma. }

Before me, J. L. Redondo, county recorder in and for said county, on this day personally appeared Friday M. Neahr, an unmarried woman, personally known to me to be the same person whose name is subscribed to the foregoing instrument as a party thereto, and she acknowledged that she executed the same for the uses and purposes therein mentioned. Said Friday M. Neahr further declared to me that she was twenty-one years of age on the 25th day of September, 1892.

Witness my hand and notarial seal this 14th day of October, 1892.

J. C. REDONDO,
County Recorder.

[RECORDER'S SEAL.]

TERRITORY OF ARIZONA, }
County of Yuma. }

Freeson Neahr, being by me first duly sworn, deposes and says that he is the son of David Neahr, deceased, and the brother of Friday M. Neahr, a daughter of said David Neahr, deceased; that to the best of his knowledge, belief, and information said Friday M. Neahr was twenty-one years of age on the 25th day of Sept., 1892.

FREESON NEAHR.

Subscribed and sworn to before me this Oct. 14th, 1892.
J. L. REDONDO,
[RECORDER'S SEAL.] *County Recorder.*

TERRITORY OF ARIZONA, }
County of Yuma. }

Samuel Purdy, being by me first duly sworn, deposes and says that he first knew Friday M. Neahr, a daughter of David Neahr, deceased, in the year 1874; that at that time said Friday M. Neahr to the best of my judgment was three to four years of age; that full faith and confidence and credits may be placed in all statements of said Friday M. Neahr and Freeson Neahr.

SAMUEL PURDY.

Subscribed and sworn to before me this Oct. 14th, 1892.
[RECORDER'S SEAL.] J. L. REDONDO,
County Recorder of Yuma County, Ariz.

(Endorsed.)

TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neri Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was
45 filed for record at 11.20 o'clock a. m. on this 15 day of Oct., 1892, and duly recorded in Book No. 31 of Deeds, Records of Maricopa County, Arizona, at pages 312 & 313.

Witness my hand and official seal the day and year above written.
NERI OSBORN,
County Recorder,
[RECORDER'S SEAL.] By WM. E. THOMAS, *Deputy.*

Friday M. Neahr to Peter T. Burtis.

RECORDER'S OFFICE, PHŒNIX, MARICOPA CO., A. T.

Filed and recorded at request of George B. Perkins Oct. 15, 1892, at 11.20 a. m., Book 31 of Deeds, pages 312 & 313.
NERI OSBORN,
County Recorder,
By WM. E. THOMAS, *Deputy.*

(Endorsed:) Filed October 21st, 1895.

SAMUEL PURDY, a witness called and sworn on behalf of plaintiff, testified as follows:

I reside in Yuma; have lived there since February, 1874. I knew David Neahr in his lifetime and his family. I know the girl Friday M. Neahr, the one we call Mary. I came here in February. At that time I judged her to have been a child of some three
46 or four years of age. I know nothing of my own knowledge, but she was running around here at that time, and I judge her to be about that age.

Cross-examination.

By Mr. ARMSTRONG:

I am not interested in the prosecution of this case. I obtained the deed from Friday Neahr to Burtis and interviewed the parties to the case. Bill Neahr spoke to me, and then I met Mr. Fickas and went with him to the house and introduced him to Mary Neahr. I don't remember that I saw any other member of the family at that time. Mr. Fickas took the deed with him. I don't remember what consideration was paid for the deed. I had very little to do with it outside of introducing Mr. Fickas to them. I don't remember that I had any conversation with Mr. James Neahr at that time with regard to Mary's age. I was not in James Neahr's saloon on that day that the deed was issued, that I remember of.

Q. You was testifying as to knowing the age at that time. Now, in the saloon on the day the deed to Mr. Burtis was executed didn't James Neahr say that Mary wasn't of age at the time that the deed was executed?

Plaintiff objects to that as calling for hearsay testimony of James Neahr in 1892.

47 By the COURT: I think they don't pretend to show this.

By Mr. ARMSTRONG: We think that it lays the foundation for the impeachment of the witness after showing his interest in the case.

By the COURT: I don't think that is proper. I will sustain the objection to that.

Defendant excepts to the ruling of the court.

(Cross-examination renewed:)

I first remember of seeing Mary Neahr shortly after I came here. I then lived in Yuma, down on the other street, about two houses from Mr. Neahr's. That is now called the Palace Hotel building, and I had rooms in it then. Mr. Neahr had a store then, and the children were in and out of the store at that time. There was Mary, Fannie, Bill, and Jim, and, I think, Will. I don't remember that there was any younger than Mary at that time. Mrs. Neahr was around considerable of the time. I don't remember how soon after that other children were born into the Neahr family, but I remember there was one younger. I lived within two houses of the Neahr store, and the children were a good deal in and out of the store then. My recollection is that Mr. Neahr lived at the old quartermaster's headquarters. I think it was three or four blocks away from the store. I must have lived about the same distance from Mr. Neahr's house as from the store—that is,

48 about three or four blocks. I don't remember whether I was in David Neahr's house during the summer of 1874, but I must have been. I had a good deal of business with him. All I know is by seeing this child running around the house, and I remember from the size she was. I judge her to have been about that old at that time. She was pointed out to me as Mary Neahr, and I

have heard her called by that name. I have heard Mr. Neahr so call her. At the time I saw her running around the yard I heard Mr. Stearns, the book-keeper, and Welcome call her Mary. I remember her as I do all of the children ever since that time. I first saw Mary in the store, I think; the children used to be in and out of there a good deal. It was in 1874 I saw her. It was some little time after I came here that I first saw her in the store, and from that time up I was constantly seeing them. I don't know where I first her at the store. I don't remember of seeing her at the house at all. As I recollect it, at that time, in 1874, they lived at the house down near the quartermaster's department, four or five blocks from there. The old house was over the hill, and I recollect that he lived in that old house back of that quartermaster's department, and afterwards he built a two-story house on the lot. That house has fallen down now. I am not positive that there is anybody living in it.

49 Redirect examination:

I have no interest in this case whatever, and I am not benefitted by it one ten-cent piece. I didn't know until yesterday that the case was here for trial. I didn't know anything about that, only I learned that Mr. Marshall was here.

Recross-examination:

I have not been looking up testimony in this case. No affidavits have been taken before me in this case. I had no knowledge of the case, but I did get some information two or three months ago that I might be needed in the case—that is, I might be needed as a witness to go to Phœnix—and they wanted to know if I would go if my expenses were paid. That is all I have known about this case since Mr. Fickas was down here.

By Col. FITCH: It is admitted, I suppose, that the title was in David Neahr—the title to this property?

By Mr. ARMSTRONG: Yes; we admit that.

By Col. FITCH: That is all, excepting as under the stipulation; that is all of the testimony that we have in this town at this time. I will recall Mr. Weiger a moment.

Mr. E. H. WEIGER, being recalled on the part of plaintiff, was examined and testified as follows:

50 By Col. FITCH (presenting written instrument): Is that your handwriting?

A. Yes, sir.

Q. And you say that you made it in 1871?

A. Yes, sir.

This is the blank application, your honor, referred to. We offer this in evidence in this case.

(Same identified as Plaintiff's Exhibit "C.")

By Judge STILWELL: This is objected to on the ground that it is

immaterial, incompetent, and irrelevant, and it is not shown to have been the paper which was made at that time or at the time of the happening of any event to which the witness has testified, and therefore it is irrelevant, incompetent, and immaterial.

By Col. FITCH: The witness has testified that it was made by himself and in his own handwriting.

By the COURT: I will take it subject to the objection.

By Judge STILWELL: We move to strike out the balance of the testimony of Mr. Weiger on the same grounds that is raised to the admission of the paper.

By the COURT: I will deny the motion to strike out.

Defendant excepts to the ruling of the court.

Plaintiff rests.

51 Mrs. TRINIDAD MUZZY, a witness called and sworn on behalf of the defendant, was examined and testified as follows: I live in Yuma and have lived here 25 years. I was acquainted with David Neahr and his family in his lifetime. In 1873 I was running a restaurant in this town. I purchased the lot upon which that restaurant was built on December 26th, 1872. At that time my name was Mrs. Edward Williams. The restaurant was about six weeks in building after I bought the lot. I opened it for business on February 22, 1873. David Neahr and his family were among my customers at that restaurant. They continued to eat their meals there until July. The family stopped eating their meals there in July, except Mr. Neahr; he continued to eat his meals there. Mrs. Neahr came once or twice in July, and then she didn't come any more, because she was carrying big and she was afraid she would fall down on dark nights, and that is the reason she didn't come any more. There was no blocks at that time and I could not say how far she lived from the restaurant.

Q. State whether after that time David Neahr said anything to you about the birth of a daughter.

By Colonel FITCH: We object to that.

By the COURT: The objection is overruled.

Plaintiff excepts.

52 A. On the 16th of September there was a celebration of the Mexican independence and he came to my house with his friends, and I asked why Mrs. Neahr didn't come and he said she had been confined, and that is the reason.

Q. Did you state anything further?

A. Yes; I asked whether it was a boy or a girl and he said it was a baby girl, and he said: I would rather have a baby girl than baby boys. He didn't say why, but he said he would rather have a girl than a boy. He treated the boys there until late in the evening—away along till 2 or 3 o'clock in the morning—on account of that baby girl that was born. I know that he had another daughter at that time, a little girl named Fannie. I don't know hew old she was. There was a boy five or six years old and a girl named Fannie. I saw Mrs. Neahr, maybe, three months after that. I am

acquainted with Mary Neahr. I have been acquainted with her all of this time and with her mother ever since I came to this country. I saw Mary Neahr about three weeks after the 16th of September, 1873. Mrs. Neahr came to my restaurant with the child, and they have called her little Mary ever since. The time when I opened my restaurant is fixed in my mind because I bought the lot at that time, and as soon as I built my house on it I opened my restaurant,
53 and I can show you the deed that I bought the lot with and the date. I have the deed with me. (Witness produces deed.) This deed from William R. Larkin to David Williams, dated December 6, 1872, and recorded July 11, 1873, in Book 1 of Deeds, at page 562, of the records of Yuma county, is the deed I received for the restaurant lot. I held that deed in my possession until five years ago.

(Deed offered in evidence by defendant.)

By Judge CAMPBELL: We object to that as irrelevant.

By the COURT: I will take it subject to the objection.

Deed from William R. Larkin, of the town of Arizona city, Yuma county, A. T., to Mrs. Trinidad Williams, of the same place, dated December 6, 1872, conveying to said Mrs. Trinidad Williams the following-described premises: "All that certain piece or parcel of land situate, lying and being in the town of Arizona, in the county of Yuma, A. T., and bounded and described as follows, to wit: Commencing at a point on the corner of Gila and First street-, and running from thence in an northerly direction thirty-six feet along Gila street, and in front of the property of M. McCartney, to a point thence in a westerly direction ninety feet to a point, thence in a southerly direction and in a line parallel with the first-mentioned line thirty-six feet to a point, thence along the line of
54 First street in an easterly direction ninety feet to the place of beginning, being a lot thirty-six feet front on Gila street, by ninety feet deep," was then introduced and marked for identification Defendant's Exhibit "A;" said deed acknowledged December 26, 1872, and recorded Feb'y 11, 1873, at 9 a. m., in Book 1 of Deeds, Yuma County, on page 562.

Cross-examination.

By Colonel FITCH:

There was more than five children in the Neahr family at the time I opened my restaurant. It might have been six or seven; I could not tell exactly how many. I could not swear that there were seven. Yes; I know there was. I am sure there was six, and they all took their meals at my restaurant. I kept books at that time, but the washout in Yuma took all my stuff and papers, excepting my deeds. Before I went into the restaurant business I was running the ferry-boat on the California side. I have lived here 25 years, excepting one or two months in the summer time. I came here in 1870. I first remember what I have testified to here now in respect to the declarations of David Neahr and Mrs. Neahr to me at the time, in 1873, when the child was born—from the

time that girl was born and the time I opened my restaurant. I remember what David Neahr said to me at the time he came to me and said his wife had a girl baby, and that he preferred it to a boy, because he came in with his friends and I asked
55 him, Why is your family not come? and he said, My wife has a baby. I have had that circumstance in my mind ever since. My first talk with anybody or with the defendant in this case was about three days ago. There was a gentleman came to my house with Mr. Marshall, and he asked me if I knew anything about this, and I said, Yes; I remember the year and the months, but don't the day. That was the first time anybody said anything to me about it. I remember it all these 22 years, and told Mr. Marshall just as I recollected it. It was in the year that I opened my restaurant, and I recollect the conversation with David Neahr at that time. I didn't tell any one else before I told Mr. Marshall about this conversation that I had with David Neahr, and I don't remember of anybody saying anything about it. I know Mrs. Post. I never had any conversation with her about this matter. She never mentioned the name of Neahr to me. I will tell you anything you ask me that happened in 1873. The water came to me twice. I can tell a good many things about that. I can recollect one thing that occurred in 1873. My daughter died here after that. That was in 1887. I don't recollect anything particularly that occurred to me in 1874. I can recollect that in 1872 I bought my lot then and got a deed to it. I don't recollect that I bought it in 1874. I recollect that I lost my restaurant by a washout in
56 1875. I don't recollect anything that occurred particularly in 1876. Nobody was associated with me in the running of that restaurant. I had a servant most every day. Some of them didn't suit me very long, and I discharged them and got another. At the time I had this conversation with David Neahr I had a Mexican boy for servant. His name was Decota. He is dead now. I only kept one servant. I changed them most every few days. It might have been Antonio Decota that I had at the time I had that conversation with David Neahr. My servants didn't hear my conversations with my friends. I had two tables in my restaurant; always two. They accommodated sometimes ten or twelve or fifteen or twenty people. I had no boarders in that year, in the summer, but I had a good many to eat at my table. Mr. Neahr had lunch there most of the time, and Mrs. Neahr came with the family often. I can give you the names of some of my patrons that used to take meals there. I could name Mr. Baltz, John Dorrington, the freight officer; William Hopkins, and a good many others that are now dead. The Neahr family boarded with me up until July, the time they left on account of her condition, and in July, August, and September I saw her twice in those three months every day. From the time I opened the restaurant until July there was Mr. and Mrs. Neahr and I think five or six children; maybe six or seven. There was more than five. They ate their meals there at night, usually
57 between six and seven o'clock. They didn't eat their breakfasts there nor dinner—only supper. They all eat their meals

there. A good many were there besides Mr. Dorrington. I remember that most of the whole of them are dead. There was Captain Johnson. There was Charley Brinley, for one. I don't recollect anything that he said to me. I don't recollect anything that Mr. Baltz said to me, only I know that he was married some time after that. I charged from 50c. to $1.00 for meals at my restaurant for each person. When Mr. and Mrs. Neahr came with their family I charged them from $10 to $12 per night for the whole family. That is what I charged the whole family. The whole family took their suppers there often twice a week or once a week, and sometimes regularly, and he paid me $10 or $12 every time the family came. I think Mr. Knight was another one of my customers that patronized my restaurant at that time.

By the COURT: Were you married or single at that time?

A. I was married with Edward Williams.

Q. At the time you kept this restaurant?

A. Yes, sir.

By Col. FITCH: Did you sell wines and liquors at your table in that restaurant?

A. Yes, sir; that is what made the meals come high. I gave it with suppers.

58 Witness excused.

ELIZA WEBER, a witness called and sworn on behalf of defendant, was examined and testified as follows:

I live in Yuma; have lived here ever since I was born. I am 31 years old. I knew David Neahr in his lifetime and his family. I lived very close to them—something over 200 yards. I know Mary Neahr. I remember the time she was born. My youngest brother, James Jones, was born in the same year. I was nine years old when my brother was born. I saw Mary Neahr when she was a child. I saw her right after she was born. I used to be always among them, and after she was born I went over there to see her with my youngest brother in my arms. I remember when my brother James was born. It was on July 15, 1893. He is living here now. He was baptized here in the Catholic Church. He was baptized under the name of Santiago Jones. I do not remember the date of his baptism, but it could not have been later than the same month. I think it was in July, 1873. My mother's name was Elaria Armenta Jones.

Cross-examination.

By Judge CAMPBELL:

59 I was born in 1864. I lived a little over 200 yards from Mr. Neahr's house. They lived then where they live now. I lived where Mr. Modesti's building is; right behind his store. I was then nine years old. I visited the Neahrs with my brother when Mary was born. It was on the day of her birth, right after she was born. I always went there every day. I used to be always among them. I went there because I was anxious to see the

child. That was in 1873. I think it was in the early part of the month of September. I went there afterwards almost every day, and before then I used to go there nearly every day. I went there when Mary was born. I cannot tell any particular time when I used to make my visits there—in the afternoon or in the forenoon or in the evening. I don't recollect whether I was there in February, 1873, and I don't recollect whether I was there in March, 1873. I recollect going there in November, 1873; all of the time I used to go there. I recollect the fact that I was there every day nearly. I have not spoken to any one lately about having been there the day Mary Neahr was born. I think Mr. Marshall talked to me about it, and I told him what I knew. That was last year some time—in this month. There were six children there besides Mary. I was nine years old at that time. I think the Neahrs lived at home and ate at home during that time. I don't know whether they boarded at home or not, but I think they did. I know Mrs. Post. I
60 have conversed with her about this matter not very long ago. She went to my house about three or four times and we talked about this matter. We talked it over.

Redirect examination:

I remember something else that happened in the summer or year that Mary Neahr was born. I remember about that hanging. It was a Mexican that was hung. It was a hanging by the sheriff of this county here in Yuma. It was in 1873; it was in May, I believe. I have known Mary Neahr ever since she was born.

By Col. FITCH: Was Mary Neahr born before or after the Mexican was hung here?

A. After.

By Judge CAMPBELL: And it was in 1873?

A. Yes, sir.

Witness excused.

JULES GHELDOF, a witness called and sworn on behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

My full name is Jules Gheldof. I am the parish priest in this town, and I am the priest in charge of the parish of the
61 Roman Catholic church in this place. I have been here four years. I have in my possession the records that have been kept in the parish church. I will produce the record of births for the year 1873, as kept by my predecessor in office as priest in this parish. (Witness produces book.) This is the record of baptisms.

Q. Will you turn to the date of July 30th, 1873?

By Judge CAMPBELL: We will object to the introduction of the book, as it has not been properly identified.

By Mr. ARMSTRONG: From what source did you receive this book?

—. ——.

Q. Can you state whether this is the record of baptism as kept in this parish?

A. Yes, sir; it is.

By Judge CAMPBELL: We object to that. He don't know that of his own knowledge; he shows that he don't.

A. It is stated on the very records and is signed by my predecessor.

By Colonel FITCH: We submit, your honor, this is not proper.

By Mr. ARMSTRONG: What was the name of your predecessor?

A. Father Chaucot. I am acquainted with his handwriting, and I know this book is kept in his handwriting.

Q. You may state whether it is the custom of the Roman
62 Catholic Church to keep a record of baptism of the children in that church.

A. Yes, sir; it is.

By Colonel FITCH: We object to that.

By the COURT: The objection is overruled.

By the COURT:

Q. Does the Catholic Church keep a record of the births of the children who have been baptized?

A. Yes.

By Mr. ARMSTRONG: Does the Roman Catholic Church keep a record of the baptisms, births, and marriages of its communicants and those born into the church?

A. Yes, sir. This is such a record for this church.

Cross-examination.

By Colonel FITCH:

I knew my predecessor. I did not serve with him here, only just a few days. I know this is the record referred to by the list of marriage certificates. I know his handwriting. I know this to be the book of the original records by the signature. The way I authenticate it is because I recognize the handwriting. I know my predecessor was parish priest in 1873. I came here four years ago. I know he was parish priest 23 years ago by hearsay.

By Colonel FITCH: That is what I thought, and I object
63 to it.

By Mr. ARMSTRONG: We will withdraw Father Gheldof a moment and have Mrs. Post sworn.

Witness excused.

Mrs. MARY E. POST, a witness called and sworn on behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I reside in Yuma, and have lived here 23 years. It is 23 years since I came here, but I was away for a year since that time. I was here in 1873, and left here on the first day of July, 1873.

Q. State, if you know, who was the parish priest in charge of the Roman Catholic church here at that time.

By Colonel FITCH: At what time was that?

A. I left here on the first of July, 1873. Chaucot was here then, and he had associated with him Father Pedro, who is in Tucson. I was gone about a year, returning the next fall. When I returned in the fall of 1874 Father Chaucot was the parish priest. He is French. He continued to be priest here until Father Gheldof came.

By the COURT: Were you acquainted with Bishop Lu Pointe?

64 A. Well, he may have visited here occasionally, but he wasn't the priest at that time. I left here on the first day of July, 1873, and returned on the first week of September, 1874, and I don't know who was associated with him during that time I was away.

By Colonel FITCH: We think it is insufficiently authenticated yet.

By the COURT: I think the book is admissible.

By Mr. ARMSTRONG: If we haven't made the offer, we will now do so. We will ask to have this record admitted in evidence or so much of it as may be necessary.

By the COURT: It may be admitted.

By Colonel FITCH: Plaintiff except to the ruling of the court.

By the COURT: I don't mean to express anything about this record, as to its value or the weight of the testimony, of course; but it seems to me that the book imports upon its face that it is an important record in this community.

By Mr. ARMSTRONG: You will please take the stand again, Father Gheldof, and turn to the record of the baptisms on the 30th day of July, 1873.

A. Yes, sir.

By Colonel FITCH: We object to this because the lady says she left here on the first day of July, 1873, and didn't come back

65 here again until September, 1874. Now, we refer to the time when she wasn't here and when the question of who was priest hasn't been proven.

By the COURT: I will overrule the objection. I think there has been some evidence that this is in the handwriting of Father Chaucot.

By Colonel FITCH: I would like to see that before you read it.

(Counsel examines record.)

By Mr. ARMSTRONG: We have the record of July 30, 1873. It is the baptismal record?

A. Yes, sir.

We offer in evidence the record of the baptism of Santiago, son of Eliria Armenta, on the 30th day of July, 1873, it being the child spoken of by Mrs. Weber as her brother.

By Colonel FITCH: We object to that. We don't see what that record has got to do with this case. It is immaterial, incompetent, and irrelevant to any of the issues in this case.

By Mr. ARMSTRONG: We will follow that up, your honor, and show the connection.

By the COURT: I will take it subject to the objection.

Same was thereupon marked by the reporter as Defendant's Exhibit "B," a copy of the original certified copy of the clerk of the court being as follows:

66 (DEFENDANT'S EXHIBIT "B.")

In the District Court, Third Judicial District, Territory of Arizona, County of Yuma.

PETER T. BURTIS
vs.
NORTON MARSHALL.

Copy of the baptismal record introduced in the above-entitled case by the defendant, to wit:

"A los 30 dias de Julio 1873 Bautiza solema a Santiago hijo de Ylaria Armenta nacido el 15 de Julio 1873 Padrinos, Juan Mendoza Y. Carmen Valensiscla.

J. M. CHAUCOT."

"A los 3 dias de Agos to B 1873, Bautize solema a Ricardo Well Comb, hojo de Mercedes Mendoza, nacido el 13 de Junio 1873, Padrinos Ricardo Lellvas Y. Concepcion Lellvas.

J. M. CHAUCOT."

I certify the foregoing to be a full, true, and correct copy of the baptismal record of Santiago, son of Ylaria Armenta, and Ricardo Wellcomb, son of Ben. Wellcomb and Merceded Mendoza.

Witness my hand and seal of said court this 21st day of October, 1895.

[District Court Seal.]

C. H. BRINLEY, *Clerk.*

67 (Endorsed:) Filed October 21st, 1895.

By Colonel FITCH: Plaintiffs except to the ruling of the court.

By Colonel FITCH: You say that this is the record kept by Father Chaucot?

A. Yes, sir.

Q. Will you please translate the record as it appears there?
A. "On the 30th day of July I baptized publicly James, the son of Eliria Armenta, born the 15th day of July, 1873." That is signed by J. M. Chaucot. I translated the name James; that is the American name for Santiago in Spanish.

By Mr. ARMSTRONG: We will ask to have the clerk copy this part of the record into English for the purpose of filing in this case.
By the COURT: Yes; the clerk may do so.

(Same heretofore identified as Defendant's Exhibit "B.")

By Colonel FITCH: That is the birth of the child as testified to by Mrs. Weber?
A. Yes, sir.

By Mr. ARMSTRONG: You may examine that certificate and see if that is the handwriting of your predecessor, Father Chaucot?
68 A. Yes, sir; it is. It is dated the 13th day of June, 1874.

By Colonel FITCH: There is a question I would like to ask of the witness, Mrs. Weber. (Witness steps aside.)

Mrs. WEBER resumes the stand.

Q. I want to ask you what was the first name of your father?
A. J. W. Jones. I don't recollect when he died, but it was in 1869 or 1870. My mother's name was Armenta, and Santiago is the son of my mother, born in 1873. That is the same one that was baptized on the 20th day of July, 1873. He is known as Santiago Jones.

Witness excused.

Father GHELDOF, being recalled, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I have the record of Recardo Welcome. I will read it. Born on the 13th day of June, 1873, son of Ben. Welcome and Mercedes Mendoza.
Q. That is a part of the same record which we have offered?
A. Yes, sir.

We will now offer that record in evidence, subject to be connected by the next witness. That is all.
By Colonel FITCH: We object to it on the ground that you cannot prove it by contiguous births of other children.

69 By the COURT: That is admitted. I will take it subject to the objection.

Witness excused.

Mrs. DOWNEY, a witness called and sworn on behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

My full name is Mendoza Downey. I live here in Yuma. I was acquainted with David Neahr and his family. I have been living here since 1854. I know Mary Neahr. I didn't know her much to be acquainted with her, but I have known her since she was born. I have a son that was born in the same year that Mary Neahr was born. His name is Richard. His father was John Wilkerson. He was never known by any other name. My name at that time was Wilkerson. Before I was married to him my name was Welcome. Before I was married at all my name was Mercedes Mendoza. That is my father's name. My son Richard was born about the 13th of June. He was baptized in the parish church here by Father Chaucot. That was the priest that was here before this present one. I don't remember how soon after his birth my son was baptized. I think it was in August that he was baptized. Mary Neahr was born some time in September, after my son was born, in the
70 same year—in 1873. I remember that my son and Mary Neahr were born in the same year, because my mother was there working for Mrs. Neahr. She went to work there some time in August, and staid a month, and she left Mrs. Neahr's some time in September. I don't remember. I don't recollect the day she left. She left her, and three days after she left her she got the baby. It was a little girl baby called Mary. Three or four days after my mother left Mrs. Neahr's, a girl baby was born to Mrs. Neahr. I also recollect that Mary Neahr was born in the same year as my son, because I went to see her, and she told me about her baby and asked me about my baby when she was nursing the little girl. That was Mrs. Neahr. She gave him the breast. That is what I have remembered. The same year that my mother used to work there I used to work for Mr. Weiger, right near his place, and I was acquainted well with them, and there was a feast here, and while I was over there with my boy baby he was crying, and Mr. Neahr said to his wife, Why don't you take that child and feed it? and so she nursed it herself. That was about six months after the birth of Mary Neahr that Mrs. Neahr nursed my son.

By the COURT: I didn't understand that.

By Mr. ARMSTRONG: Will you state to the court the circumstances under which she nursed your child?

A. It was before the beginning of a feast here, and I had a
71 little stand and was selling coffee and cakes, and Mr. Neahr came along one night to eat supper, and I have my little baby there, and it was crying, and Mr. Neahr told his wife to take it and feed it, and she was away frem the table, and Mr. Neahr got the baby and gave it to her, and she nursed him, my little boy, and that was in the same year. That feast commenced about the 8th of December. I worked for Mr. Weiger, but not at that time. I was working out, though, and when I stopped working for Mr. Weiger I had been

working for that man not more than two years. Sometimes I would go and stay two or three months, and sometimes six months, and sometimes a year. He lived here in Yuma. He lived pretty near down to where Mr. Neahr's place is. The house belongs to Mrs. Tiger. That must have been in 1871 that I commenced to work for him, and that was when he was living — Mr. Neahr's place. Mary Neahr was not born at the time Mr. Weiger lived near to Mr. Neahr's house. Mr. Weiger lived on this side, where Mr. Gandolfo's house is, when Mary Neahr was born. I don't remember for sure how long Mr. Weiger lived down at Gandolfo's house when Mary Neahr was born, for I didn't work much for him when he lived there. I didn't stay but about two months, but I stayed in the other house to work for him two years, for I used to work for him before he had his second wife. She was a Mexican wife, and the last one was
72 a —. I stayed with him and I used to go to work for him all of that time. I also remember that in the year 1873, the year my son Richard was born, that there was a Mexican hung here because he killed Mr. Rawhide. I saw that man hung. He was hung on the second of May. That was before my son Richard was born. Mary Neahr was born in September after that, but it was in the same year—1873.

Cross-examination.

Examined by Judge CAMPBELL:

The Neahrs lived in the same place where they live now when Mary Neahr was born, but they used to have another house. The house Mary Neahr was born in was in the same place where they live now, only that the house is moved back on the lot because the railroad is built along there. The house has not stood where it was when Mary was born. It is a different house. Mr. Weiger's house was near to Mr. Neahr's, only there was a little street only just so wide as from me to there (12 to 15 feet) when Mary was born. That is when I mean. I have other children besides Richard. I have six children. I know the date of the birth of the first child. My first child was born in 1866, on the first of November. I am sure about that. The first child was born in California. I cannot tell you the date of the birth of my second child, but I have got it in my book. I
73 don't know whether it was in 1869 or '70. I think the birth of the third child was in 1873. I cannot tell the date of the birth of the fourth child, but I have got it in my book. I don't remember the date. I cannot tell you the date of the birth of the fifth child. The sixth child was born the 16th day of March, 1881. I do not remember anything that happened in 1872 that is impressed upon my memory, nor in 1871, nor in 1874, nor in 1875, nor in 1876. I don't know as I can remember what occurred in the different years by years. I didn't pay any more attention to it by the years. I did not talk to anybody about the year of Mary Neahr's birth, only when Mr. Marshall spoke to me. He spoke to me about it about a year ago.

By Judge STILWELL:

At the time Mary Neahr was born Mr. Weiger lived where Mr. Gandolfo lives now. I don't mean to say that he was living across the street, but near where he was living—just a little ways. It is not very far.

Witness excused.

Mrs. ROSA SILVA, a witness called and sworn on behalf of defendant, was examined and testified as follows:

J. L. Redondo was duly sworn to act as interpreter to interpret the English into Spanish and the Spanish into English in this case as between the court, the counsel, and the witness, and did interpret for the said witness in the said cause as follows:

74 The usual form of oath was duly administered by the clerk to the witness, through the interpreter, and the examination proceeded as follows:

Examined by Mr. ARMSTRONG:

My name is Rosa Silva. I am 70-odd years old. I live on Gila street in this village. I know Mary Neahr, and have known her since she was born, at the age of four days. I saw her at her house four days after she was born. Her father and mother were living at that time in this street here (pointing to street running north and south past the court-house), in the house of Mr. Neahr. I don't know what street it is. It might be the street that is now partly taken up by the railroad. I don't understand this business.

Q. Can you tell or do you remember of the birth of any one else that occurred in the same year with that of Mary Neahr?

By Judge CAMPBELL: We object to the form of the question.

By the COURT: The objection is overruled.

By Judge CAMPBELL: Plaintiffs except to the ruling of the court.

A. Yes.

By Mr. ARMSTRONG: Who?

75 A. First I assisted one in the month of April, then assisted another one in the month of May, in Antelope. I went there to assist her, and then I also came to see my daughter, who was also awaiting, and then Mr. Neahr, the father of this Mary, asked me if I was unoccupied, and I said no, and then he says: You can go for a month and assist my wife, she is sick, and there is nobody to assist her, and I cannot find none on account of the warm weather. So I went and I assisted her for the month, not exactly a month, but shortly—a few days—because he told me to retire—it had been a long time, and this lady wouldn't conclude with her confinement—and I retired. I retired to my house, and in some days I was sent for. She had got through her confinement, and I returned and went there and asked her only—I asked her how she got through her confinement, and then she answered: All the time you was looking after me I didn't have my child, and as soon as you retired I had it.

Q. State what else Mr. Neahr said to you.

By Judge CAMPBELL: We object to the statements made by Mrs. Neahr.

By the COURT: The objection is overruled.

By Judge CAMPBELL: Plaintiffs except to the ruling of the court.

By Mr. ARMSTRONG: State what else Mrs. Neahr said at
6 that time.

A. That is all Mrs. Neahr said at that time, only she said he wasn't sick very long, and she had this child very quick, and hen I bid her good-bye and retired to my house. I saw the child t that time because she showed it to me. She showed me a child nd said it was a little girl, but I didn't undo her. I didn't know ow she was named then. I don't think she was named at that ime. Afterwards she was named Mary. I have heard her called Iary. I have seen her while she is grown, and her name is still Iary. My daughter's name, the one I waited on just before I went o Mrs. Neahr's, is Merced Wilson. I think she is the person who as the last witness here upon the stand. Before my daughter was narried her name was Merced Mendoza. The name of my daughter's child that was born in the same summer as Mary Neahr was Dick. He was baptized in the Catholic church here. I don't remember how long after his birth it was that he was baptized, but ll of those that I assisted with were baptized. I remember the birth f the son to Mrs. Jones, who is now called Santiago Jones. I assisted hem and helped with the child. That was two months before Iary Neahr was born, I think, that Santiago Jones was born. Those hildren were born in 1873. I remember of other things that I assisted in 1873, the same year that Mary Neahr was born.
7 These ladies I can give proof of the three of them, but other things I cannot say.

Cross-examination.

By Judge CAMPBELL:

The first lady that I assisted in 1872 was this lady, Keepen, and hen this lady, Jones (pointing to last witness on the stand). That dy, the mother of Santiago, is the lady Jones I refer to, but the rst lady that I assisted was a lady that had twins at Antelope; that as in the same year that my grandson was born and all of those hers were born.

Witness excused.

By Mr. ARMSTRONG: We desire to offer this record of births again r the purpose of proving the baptism on the 4th day of May, 1873, Isabelle Van De Blis, daughter of Magdeline Van De Blis, who as born in April, 1873, as the mother of this child is not in Yuma, t we are taking her deposition at this time, and we will ask that e clerk make a copy of the record to file in this case.

By Colonel FITCH: We make the same objections as in the former stance.

By the COURT: I will take it subject to the objection.

By Colonel FITCH: Plaintiffs except to the ruling of the court.

78 By Mr. ARMSTRONG: I will ask Father Gheldof to come to the stand and read and translate the same from the record into English.

Father GHELDOF, resuming the stand, reads: On the 4th day of May, 1873, I baptized publicly Isabelle Man De Blis, daughter of Magdeline Man De Blis, born on the 7th day of April, 1873. Signed by J. M. Chaucot. This I have just read from is the record in evidence before. It is the baptism record of the Catholic church in Yuma.

Witness excused.

CAROLINE MCINTYRE, a witness called on the part of the defendant, was duly sworn, and upon examination testified as follows:

Examined by Mr. ARMSTRONG:

My full name is Caroline McIntyre. I live here in Yuma. I was born over the river, in Santiago county. I don't know how long I have lived here in Yuma, for I was very small when they removed onto this side of the river. I was acquainted with David Neahr in his lifetime. I know Mary Neahr. I have known Mary Neahr ever since, I think, she was about 8 or 9 months old. The circumstances under which I first saw Mary Neahr were these: I used to go to the school that was
79 held by Mr. and Mrs. Nash. They lived close to Mr. Neahr's place, and Mrs. Nash used to tell us children to come to her after school was out—to go to her house and she would help us with our books; and my sister and I used to go to Mrs. Nash's place, and that is the way I knew Mary Neahr, for they lived so near that I would very often see Mrs. Neahr's servant with the child in her arms, and she must have been 8 or 9 months old at that time. That was in the month of March, 1874. I remember that it was 1874, because I was going to school to Mr. and Mrs. Nash. They taught here their full term. I think the school commenced in October and I think it was closed in June. Mrs. Post taught school here before that. Mrs. Post also taught here after Mr. and Mrs. Nash left. It was during the absence of Mrs. Post that I went to the school of Mr. and Mrs. Nash. I have known Mary Neahr ever since.

Cross-examination.

By Colonel FITCH:

I was born in 1859. I do not know the next youngest child to Mary in the Neahr family. I do not know the next youngest one. I don't know anything about their children now, for we live quite a ways from their house. The only way I came to get acquainted with her was by my being in the school with Mr. and Mrs.
80 Nash and going to their house. They lived on Main street, and as she grew up I knew her. I wouldn't say that I was

very intimate with the Nealrs, but we knew them very well. They had lots of children besides Mary, both older and younger. There were two or three younger than Mary, I think. I have seen those as well as those that were older. I know the date that Mr. and Mrs. Nash were teaching school here to be 1874, because I was going to school to them, and I knew it was in 1874. When they asked if we knew anything about her, then I came to remember that we seen the child in arms in 1874, when I was going to school. She was a child in arms at that time.

Witness excused.

Mrs. CONCEPTION NAILOR, a witness called and sworn on behalf of the defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I reside here in Yuma. I am the sister of the last witness, Mrs. McIntyre. I knew David Neahr in his lifetime and his family. I know Mary Neahr, and have known her since she was a baby. The circumstances of my first seeing Mary Neahr was, I seen her when I passed Mrs. Nash's in 1874—in March, 1874. Mary Neahr
81 was 7 or 8 months old at that time. She was in the arms of the servant. I went to school to Mrs. Nash since the school commenced. Mrs. Nash taught her school one year, I guess; that was in 1874. Their term commenced in October, 1873. Mrs. Post taught school before the Nashes, and Mrs. Post taught the school after the Nashes went away. The Nashes were employed just in the year that Mrs. Post was gone. The Nashes' house was very near to Mr. Neahr's house; it was the same fence between them. I saw Mary Neahr at that time, I guess, for about two or three weeks, or along about that time. We was kind of behind in our studies and we had to go after school for about that time to Mrs. Nash's house and she helped us to catch up. I saw Mary Neahr every day during that time when I passed back and forth. We passed the Neahr house on our way to school.

Cross-examination.

By Judge CAMPBELL:

I was born in 1856. I was 18 years old when I went to Mrs. Nash's school. I went to school to them all the time they taught here. I guess they taught until June; I don't know exactly, but I think so; I think they stopped in June. I saw Mary Neahr at that time when I was passing from Mr. Nash's to and from my home. I know it was 1874 when the Nashes taught school here,
82 because I got married in that year. I don't remember what time of the year I got married, but I know it was 1874; it was in the fall, I think. I ain't sure it was the fall, because I didn't get married here. I cannot find out until I get home. It was two months after I last saw Mar*h* Neahr that I got married, I guess. I don't remember, but it was two or three months after; I

don't know that. I seen Mary Neahr before I got married, and then when I got married I seen her again, but she was bigger, and I seen her many times before I got married. I lived here after I got married. I guess I lived here for four or five months after I got married. I got married in Santiago, and I have been living here ever since.

By Mr. KNIGHT: Can you state the year that Mrs. Nash commenced to teach the public school?

A. I was going to school to him in 1874, I know. I don't know whether he ever kept any school but the public school here. I do not know whether he ever kept a private school. I don't know how many months he kept school here. I never heard that he was removed before his school year was out. I do not know of his keeping a school here in Mason & Newlich's building on Gila street. I do not know what year he left here to go to Ehrenbergh. I don't know that I was here then, but he left after he taught school here.

Witness excused.

83 Miss MARY E. POST, a witness called on behalf of defendant, having been duly sworn, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I reside in Yuma. It is some 23 years since I came here. I arrived on the 13th of April, 1872. I was acquainted with David Neahr in his lifetime and with his family. I know Mary Neahr. The first distinct recollection I have of Mary Neahr was in the spring of 1878. I was teaching school here at that time and had been very ill, and Mary Neahr came to the school, and, being brought there at that age to school, she wasn't of school age, and she cried a good deal, and in the afternoon she came again and I thought I would let her stay, thinking that she might be better, and if she cried I thought she would get over it quicker and it would be better for her to be there than to send her home, as long as her parents wanted her to go to school, and she began to cry again, and I sent one of her brothers home with her. This was in the spring of 1878. I may have seen her before that, but I don't remember it. I left home on the first day of July, 1873, and I went to San Francisco, and I came back here the next year. I went down through the Gulf and from there to Santiago—well, I returned home the last week in September, 1874. At that
84 time my business was teaching school. Mr. and Mrs. Nash followed me in the teaching of this school. He commenced here, as I remember it, about the first of October, 1873, and he taught one year. I did not see Mr. Nash, but he left here after I arrived home. I got here at 8 or 9 o'clock in the morning, and just before I got there the steamer went out and took Mr. Nash and his wife. They went up the river to Ehrenbergh. I know that he went on that day, and Captain Polhemus was with him. I know that this was the day, and I connect that with Mr. Nash's going

away because there was a girl, * * * and she had an aunt here, and they held the steamer a little while so that this little girl's aunt could see her, and this steamer had gone out before we got in, and that steamer carried those Nashes, with this little girl's aunt. I heard the testimony of Mrs. Rosa Silvers this afternoon. I know the twins that she spoke of as having been born in the same year with Mary Neahr and upon whose mother she waited. When I came to Yuma in 1872, in April, I came to this house that stands on the street occupied by Mr. Thurlow. The mother of those twins was in that house, and I staid there 10 days awaiting for the steamer to go to Ehrenbergh. I went up there and taught school at Ehrenbergh three and a half months in the summer of 1872, and the next teaching I did was here in Yuma in October, 1872.

85 While I was waiting at this house for the steamer I stayed with the mother of those twins. She had three older girls, and these twins were born out here at a station near Antelope in 1873, and the mother died very soon after that. I think she died in July, after the twins were born—that is, in 1873. I remember the circumstances after the mother died. Mrs. Judge Rowell sent this Mrs. Silvie out there and they brought in these two twins, and they were adopted here, and they both died afterwards, and the three little girls were left. I forgot to say that their father died here also, and I took those children to San Francisco with Mr. Percer, and I remember that we left them in the orphan asylum in San Francisco. That was in July, 1873. I reached San Francisco in the afternoon of the 22nd of July, but we got there to the asylum on the afternoon of the 23rd. Percer went with me and we left them at the convent. We took them to the convent, and we left those children there.

Cross-examination.

By Judge CAMPBELL:

I left here on this trip to San Francisco on the first day of July, 1873. I did not testify that I took those twins with me. I took the three older sisters. I think the twins died here. They were adopted and died. Captain Rowell then lived next door to Mr. Neahr's. The lot is the one owned by Mr. Tygert. At the one end

86 of the lot was the house where Mrs. Rowell lived. There was just a fence between them, and it was the next house that the Neahrs lived in. Mr. Nash commenced teaching here after I left. I was not personally acquainted with him. I have never seen him to speak to him. He came after I went away and left before I came back, or rather on the same day that I came. All this testimony that I have given about Mr. Nash's teaching is from what I have heard so far as I know, for I had letters to that effect. I didn't have letters from Mr. Nash in regard to it, but from the trustees of the school, saying that Mr. Nash was the teacher here. I don't know as I have any too much interest in this case. I don't know what you mean by saying a good deal of interest. I have been quite friendly with Mr. Marshall. I have not been

around seeing all of these witnesses about this case. I don't know how many I did see. I have never counted them up to see, but I am certain that there are some witnesses that I did not see. I don't know but I have tried to see them all. If I heard of any one that knew anything about the case I have informed Mr. Marshall. I informed Mr. Marshall that I had interviewed some of them.

Q. How long have you been working on the case?

By Mr. ARMSTRONG: I submit, your honor, that is an unfair question. It is assuming a fact that is not in evidence. We object to it.

By the COURT: The objection is overruled.

87 Defendant excepts to the ruling of the court.

By Judge CAMPBELL: Who was the first person you interviewed in the matter?

A. I don't know what you call interviewing. I don't know who was the first person I approached about whether they knew anything of the date of the birth of Mary Neahr. I will have to stop and think a little. I think I tried to remember and I didn't remember of my own knowledge, and then I tried to find out, and I inquired if any one did remember. I didn't remember when she was born. I didn't speak to them for the purpose of refreshing my memory. If I asked them about it, I suppose it was for the purpose of finding out whether they knew anything about it. I cannot remember when was the first time I commenced to speak to these persons about it. I don't know whether it was as soon as I heard of this suit being started. I don't know how long it has been, but when I heard about it I didn't interview anybody for a good long while. I wasn't here when I heard about it. I have written to Mr. Marshall about it. I haven't any idea how often I have written to Mr. Marshall about this matter. I haven't kept any account of it. I have written to him a good many times when I wasn't writing about that case. I remember I have had several children come to my school who were under school age, but I don't just recollect anybody else at

88 this time. I have had several children that were under school age, and if they didn't make any disturbance I let them stay. In 1878 I think the school age was 6 years. I am not perfectly sure about it, but I think it was. I think there was a statute of this Territory in 1878 fixing the school age of children. I am not sure, but you can verify that yourself. I am pretty sure of it. It has always been that ever since I came to the Territory. Mary Neahr's sister Fannie brought her to school. At that time I think Mary was about four or five years old. I judged so from Fannie's age. I know she was nearly the age of Fannie. Fannie Neahr was born when I came here to Yuma. I don't think that it is necessary for me to state what caused me to take the interest that I have testified to in this case in behalf of Mr. Marshall. If I knew anything about any case, I would be perfectly willing to testify in regard to it and to help in regard to it. I don't know anything about any other case. I don't know of any other case that I know anything about.

Witness excused.

O. F. TOWNSEND, called and sworn on behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

89 I reside in Yuma. I have resided here ever since 1868. I was acquainted with David Neahr in his lifetime and with his family. I am a notary public, a civil engineer, and an express agent at the present time. I am agent of the Wells-Fargo Express Company here in this town. I know Mary Neahr. I have known her and remember of seeing her since 1874. I know the year in which Mary Neahr was born. The only way I know is by my being very intimate with her father at that time. I couldn't say that I know of the time of her birth, for I didn't see her born, but I knew of the occasion of the doctor that attended her mother and also of her father telling me of the birth of the child. To the best of my recollection, she was born in 1873. I judge it was late in the summer she was born, some time in August or September. I can give you an account of other things that happened that year. There was several incidents that happened that is strongly impressed on my mind. One thing was the hanging of a man here. His name was Mendoza and he was hung for murder—for the killing of a man by the name of Rawhide. Another thing was the fact that Doctor Mix told me that he was attending the woman and I knew of his attending the mother of the child, and I was very intimate with David Neahr, and being in the store when the Doctor came down to the store he said, David, it is all right; the child is born; and I
90 asked David about it and he said, Yes; it is all right; and he said, Well, we will have to open some wine; and he made the remark at that time, It is another girl. Afterwards I learned that it was the one called Friday or Mary. She is the one that is called Mary Neahr now. I have not looked up the date of the execution of the Mexican for the murder of the man Rawhide, but I think it was before the birth of Mary Neahr.

Cross-examination.

By Judge CAMPBELL:

I couldn't tell how long after the hanging of this man it was that this birth occurred in the Neahr family. It may have been one month, two or three months.

By Colonel FITCH:

I wouldn't be certain as to the number of months. I hardly think it was as much as four or five months. It might be four months. I can look it up and find out for a certainty. I am acquainted with the Neahr family. I have taken the census a great many times. There is 9 or 10 children there. They had children regularly every year or two. They came pretty nearly every year regularly. I know of other children being born in Yuma in 1873 or 1874. There was several of them I remember being born in the

year 1873, for instance. There was one born to Mr-. Jones—
91 Armenta—one to my wife's mother, and there might have been lots of them. I was in the court-room today during the progress of this trial. I heard the testimony of some of the witnesses who were examined before me—a part of it, a very little of it.

By Mr. McKNIGHT:

I say that Dr. Mix attended the birth of Mary Neahr. He left this Territory in the fall of 1873; I am sure of that. I remember that it was not in the fall of 1872. I know George Jackson. I do not know when he died. I know that he was the administrator of that estate. I think Dr. Mix left here about the first of January, 1874, or the latter part of December, 1873, or the first part of January, 1874. I don't think it is possible that it was in the fall of 1872 that Dr. Mix left here.

Witness excused.

C. H. BRINLEY, called and sworn on behalf of defendant, was examined, and testified as follows:

Examined by Mr. ARMSTRONG:

I am the clerk of this district court. I have the record of the man who was tried in this court for murder and convicted and sentenced to be hung and was hung, but his name was Emanuel Fernandes. It is on page 113 of the term of court holden in
92 this county of Yuma in the spring of 1873.

By Colonel FITCH: We object to the record on the ground that you cannot prove the hanging of the man Mendoza by the authority that any other man was sentenced to be hung.

By Mr. ARMSTRONG: You have the record on page 113 of the records of this county for the term holden in the spring of 1873?

A. Yes, sir.

Q. Have you the sentence pronounced on the man Emanuel Fernandes?

A. Yes, sir.

By Colonel FITCH: We object to it for the reasons stated.

By the COURT: I will take it subject to the objection.

By Colonel FITCH: Plaintiffs except to the ruling of the court.

By Mr. ARMSTRONG: State when the sentence of the court was ordered to be executed and what it was.

A. (Reads:) March 28th, 1873, there was the Honorable —— ——, judge; —— ——, sheriff, and others present in open court.

This 28th day of March, 1873, court met pursuant to the order of yesterday, and the following proceedings were had:

TERRITORY OF ARIZONA
vs.
EMANUEL FERNANDES, Defendant. } Indictment for Murder.

This 28th day of March, 1873, the prisoner appearing in court and being interrogated by the court of the nature of the in-
93 dictment, of his plea, and of the verdict found by the jury, and upon being asked if he had any legal cause to show why judgment should not be pronounced against him, made no statement. The court then pronounced sentence upon him, that he should be removed to the county jail and there placed in secure confinement and there securely kept until Friday, the second day of May, 1873, and that on that day, between the hours of 10.00 a. m. and 12.00 o'clock m. in the forenoon, he be hanged by the neck until he is dead.

Q. From your personal knowledge will you state whether that sentence was executed on the day that it was required to be executed?

By Judge CAMPBELL: We will object to that. That is not the way to prove an execution.

By Mr. ARMSTRONG:

Q. Were you present at the execution of this man Fernandes?
A. Yes, sir. I don't remember what day he was executed, but I presume it was on the day stated. I do not remember the year in which he was executed. There were no other executions for murder at or about that time. I have lived here ever since 1863. This was the first judicial hanging that ever took place in the Territory of Arizona. As I have stated before, I don't recollect the year nor the day, but I recollect the circumstance of this man being hung, because I saw him hung.

Witness excused.

94 FREESON NEAHR, a witness called and sworn on behalf of plaintiff, was examined and testified as follows:

Examined by Judge CAMPBELL:

Q. Were you present at the time of the execution of this deed by your sister to Mr. Marshall?
A. Yes, sir; I was there when Mr. Marshall went there. At that time Mr. Marshall stated in my presence to my sister that she first sold to Mr. Marshall for $1,400, and the deed was sent to Phœnix, to the Valley bank. That was in 1892, I believe. That it was sent there for Mr. Marshall, and Mr. Marshall said that Mr. Walker went to Mr. Burtis to get the money to send this $1,400.00, and Burtis didn't let him have the money; so Burtis came up here and he offered us $1,500.00, and so I sent a telegram to the Valley bank, at Phœnix, to send the deed back, and that is where she got this $1,500.00 from; it was from Burtis. And then afterwards Mr. Marshall came up to the house and wanted to offer her $300.00,

to pay $100 down and the balance when they settled up fo
this piece of property. That was at the time of this last deed
to Mr. Marshall. And my sister told me to tell Mr. Marshal
that she didn't like to do that, because she had sold this property
to this party. Mr. Marshall was present and heard my sister
I was their interpreter there, and Mr. Marshall said that h
want- to get even with those parties, and that they wa
95 playing him a dirty trick, and he said that he had evi
dence that she was not of age, and in that way he would ge
even with the parties. He paid my sister $100 and a note for $300
to be paid when this was settled, and he wanted it for the purpos
of getting even. My sister said she didn't want to go back on thi
party at all—on the party that she had sold to. She thought sh
had sold when she was of age. She told Mr. Marshall that when
she was under age. I know this person by the name of Mrs. Muzzy
I don't know whether she kept a restaurant here in 1873 or not.
don't remember of our family boarding at any restaurant in 1873
We ate at home. We had a Chinaman and a Mexican there a
work all of the time, and I don't remember of having boarded a
her restaurant. I don't think I ever did. The first restaurant her
was that of Mr. Burke, in 1876. That is the first time I went to
boarding-house.

Q. Did the rest of the family board at Mrs. Muzzy's restaurant
without your knowing anything about it?

By Mr. STILWELL: We object to that as suggestive and leading
and calling for the conclusion of the witness.

By Mr. CAMPBELL: That is all.

Cross-examination.

By Judge STILWELL:

Q. What do you mean by saying that Marshall said tha
96 Burtis had served him a dirty trick, or what do you under
stand by that?

By Judge CAMPBELL: We object to that.

By Judge STILWELL: Give us all of the particulars of that dirty
trick.

A. Well, he said by his not letting him have the money to buy
this property. He said that he was in California, and that Mr
Walker was to get this money from Mr. Burtis to buy this lot, and
Mr. Burtis wouldn't let him have it, and, instead of letting him
have it, Mr. Burtis came down here and bought the lot for $1,500.00
I don't remember whether my sister said to Mr. Marshall that sh
thought it wasn't lawful at the time he went for that deed. I re
member of her saying that she had sold this property to Mr. Burtis
and she didn't like to do that—to bargain again with Marshall—
and Mr. Marshall told me to tell her that he had pretty good wit
nesses that she wasn't of age when she sold those lots to Mr. Burti
and he said that if she wasn't of age she had a right to deed

again, and he said that he had pretty good witnesses that she wasn't of age when she sold to Mr. Burtis. I don't recollect that he said if she wasn't of age when she deeded it to Mr. Burtis that she had a perfect right to deed it to whom she wished. I was simply interpreting for my sister, and that I didn't recollect at all. I didn't pay any attention.

97 Mr. Marshall said that she did not have anything to do with it, but that he wanted to fight the case himself. There was a lawyer called in for counsel in the matter to advise my sister. He went there while Mr. Marshall was there. I don't remember all that he said. Mr. Davis stated, in the presence of my sister and Mr. Marshall, that if Mary wasn't of age when she sold this property to Mr. Burtis that she could deed it again to Mr. Marshall. I heard that advice. My sister sent me for Mr. Davis; that is the way I happened to go for him. I went for him at her request. Mr. Davis is a lawyer. All I know is that Mr. Davis said let them make the deed; she will be $300 ahead, that is all; let them fight amongst themselves. I don't think I heard him say to my sister at that time that if she wasn't of full age when she made the deed to Burtis that she could then make a deed to Marshall and he would get the title to the property. My recollection is that I told Mr. Davis that the property was sold already, and she thought the arrangements was to sell it, and when I went to see Mr. Davis about —, Mr. Davis came to the house and stayed a while for them to make out the deed and let her sign, and he said: She is $300 ahead, and if he has got good witnesses to her age his title is good—that is, if Mary wasn't of age at the time of the making of the other deed, then Mr. Marshall would have a pretty good title; he stated that to my sister. I have had some

98 correspondence with Mr. Marshall about this, and I think since this deed was made. After this deed was executed by my sister, deeding these premises to Mr. Marshall, the deed was sent to Mr. Marshall.

By the COURT: What was the consideration for the last deed?

By Mr. ARMSTRONG: Three hundred dollars.

By Colonel FITCH: Are you testifying, Mr. Armstrong?

By the COURT: You may strike that out, Mr. Reporter.

By Judge STILWELL: You may look at that now shown you, and state if that is in your handwriting.

A. Yes, sir; I sent that letter to Mr. Marshall (referring to written instrument shown him) on the date it is dated, September 22, 1892.

We offer that in evidence.

(There being no objection, the same was marked as Defendant's Exhibit "C," copy of which is as follows:)

Yuma City market, Chas. Baker, propr.

YUMA, ARIZ., *Sept.* 22, 1892.

Mr. Norton Marshall, Phœnix.

DEAR SIR: Yours was duly to hand. My sister she will be 21

years old on the 25th of this month. She wants to know what can you get for the lot.

Yours very truly, WM. NEAHR.

Filed October 21st, 1895.

By Judge STILWELL: What did you do with this deed
99 after the acknowledgment by your sister?

A. I sent it to the Valley bank; the 1892 deed to Mr. Marshall. It was sent to Mr. Marshall for the collection of $1,400, and then afterwards Mr. Burtis paid her a higher price. Mr. Burtis paid the higher price about three or four days afterwards. He came up here and offered her $1,500 for the property, and then there was a telegram sent to the Valley bank to send the deed back. Mr. Burtis got a deed at that time. No one has been down here before Burtis came down here to see about it, that I remember of. I believe that Mr. Purdy went up to the house with Mr. Burtis at that time and took part in the matter.

By Colonel FITCH: We object to this testimony on the ground that it is not cross-examination. That is all new matter, and I want an opportunity to cross-examine on it.

By Judge STILWELL: Wasn't Mr. Fickas down here with Mr. Burtis at that time?

A. I don't know Mr. Burtis or Mr. Fickas. (Mr. Burtis pointed out to witness.) It wasn't Mr. Burtis; it was a short, stout man. The question was raised about the age of my sister at the time of making the deed to Mr. Burtis. I took an affidavit at that time of the age of my sister. I made and took the affidavit because I remembered the ages. We discussed her age, and I thought she was
21. Mr. Fickas didn't talk to me about it. Yes; he did
100 come down and ask me if she is of age. He asked for her age, how old she was, and she told him that she was 21 years old. Then he asked, When was you born? what day she was born, and she said on the 25th of September. My other brother, James, was not there at that time. No one said at that time that my sister might not be 21 years old; my other sister didn't say so. There was nobody but my sister and my wife and this gentleman from Phœnix there. The other sister was in Phœnix. I made an affidavit at that time that she was 21 years of age and gave it to Mr. Fickas.

Redirect examination.

By Judge CAMPBELL:

My sister told Mr. Fickas at that time that she was 21 years old, and she also told the same thing to Mr. Redondo; that she was 21 years old. Mr. Marshall did not pay me $300 for it; he paid me $100, and he said if we went into court with it and it came out all right he would pay the other $200 more when it was settled. I recognize that paper (referring to paper shown him); that is the note that Mr. Marshall gave. He sent it through the Wells-Fargo

Express Company—that is, the $100. This was on the back of it at that time.

We offer this note in evidence.

(Same, being duly admitted without objection, was marked as Plaintiff's Exhibit "D," copy of which is as follows:)

101 PLAINTIFF'S — "D."

No. —. PHŒNIX, ARIZONA, *Oct.* 20, 1894.

At the date specified on back hereof after date, without grace, for value received, I promise to pay to Mary F. Neahr or order the sum of two hundred dollars in U. S. gold coin, with interest thereon in like gold coin, at the rate of ten per cent. per annum, from maturity until paid, interest payable semi-annually, and if not so paid when due, same to bear interest at the rate of one per cent. per month until paid. All payable at Yuma in Arizona.

NORTON MARSHALL.
J. W. WALKER.

$200.00. Due ——.

(Endorsed:) The date for payment of this note is and shall be the day and date when the maker thereof, his heirs or assigns, shall obtain peaceable possession and unclouded title to lot 8, b'k 1, Neahr's addition to Phœnix, this day purchased from the payee by the payor hereof. Filed October 21st, 1895.

By Judge CAMPBELL: That is all.

Recross-examination:

By Judge STILWELL: I forgot to ask what was done with the second deed to Mr. Marshall. How did you deliver that to him?

A. I believe that Mr. Marshall took the deed himself. It was also sent by Wells-Fargo express; it was sent for the collection of the $100.00. I don't remember whether the $100 came back by express to me. I don't recollect about getting that note and the $100 from Wells-Fargo's Express Company from Phœnix after I sent up the second deed. I think I don't know anything about it.

Witness excused.

102 JAMES NEAHR, a witness called and sworn on behalf of plaintiff, was examined and testified as follows:

Examined by Judge CAMPBELL:

I am a son of David Neahr, and a brother of the witness last upon the stand. I am over 37 years old. In 1873, from February until July, I knew Mrs. Muzzy; she was Mrs. Trinidad Williams then. I think she kept a restaurant here in Yuma at that time, in 1873. I don't know that the whole of my father's family boarded at her restaurant from February until July, 1873. At that time I boarded at home. We had a cook there.

Cross-examination.

By Judge STILWELL:

In 1873 the name of my father's cook was Panoche, an Indian girl. We did use to board at the restaurant in 1873—that is, eat our meals there. I don't remember that my father and mother and brothers and sisters, all of us, went out occasionally and got dinner together. I don't recollect of going out in the whole family, but I have went out myself alone lots of times to the restaurant. I was born in 1858, and I was 22 years old in 1873.

Witness excused.

103 J. L. Redondo duly sworn as interpreter to interpret the English into Spanish and the Spanish into English.

MARY FIDO NEAHR, a witness called and sworn through the interpreter, was examined and testified as follows:

Examined by Judge CAMPBELL:

Q. I will ask you to look at this paper and the signature upon it and see if you signed that. (Deed to Burtis handed to witness.)

A. Yes; I don't remember the name of the gentleman who brought this paper to me, but I think he brought it. It was Mr. Fickas, a man with a red mustache and stout.

Q. What did you state to Mr. Fickas at that time regarding your age?

By Mr. ARMSTRONG: That is objected to as immaterial.

By the REFEREE: That will be taken subject to the objection.

Defendant excepts to the ruling of the referee.

A. Only that I had the age to sell.

Q. Ask her if she stated the same thing to J. L. Redondo, the interpreter, and to the county recorder who took her acknowledgment.

By Mr. ARMSTRONG: That is objected to for the same reason.

By the REFEREE: Taken subject to the objection.

104 Defendant excepts to the ruling.

A. Yes.

By Judge CAMPBELL: Do you know Mr. Marshall, the defendant?

A. Yes; I have seen him. He visited me at Yuma in October, 1894. I don't know how many times he visited me during that month. I think four or five times.

Q. What was the object of his visit?

By Mr. ARMSTRONG: That is objected to as calling for a conclusion on the part of the witness.

By Judge CAMPBELL: That is withdrawn.

Q. What did he say upon his visits to you?

A. That the land that I had sold to the other one wasn't sold right, and that I didn't have the age to sell and I could go back on

it. I told him that I didn't want to do so; that I didn't want to get into any scrapes, and that I thought I had the age to sell. I mean that I didn't want to go back on the other man; that it was sold well. I don't remember how many times I told that to Mr. Marshall. Mr. Marshall said to me at that time that he would get me into no scrapes, and that he had good proofs that I hadn't the age to sell. I don't remember what he said about Mr. Burtis. Mr. Marshall paid me $100. He never paid me any more money. I identify that (referring to note from Mr. Marshall for $200, Exhibit "D D"). Mr. Marshall sent it to me. I received $1,500 from Mr. Burtis for that lot.

105 Q. At the time you executed this last deed to Mr. Marshall or at any time prior or subsequent thereto, did you return to Mr. Burtis the $1,500 received from him for that land or any part thereof?

By Mr. ARMSTRONG: We object to that as immaterial.
By the REFEREE: That is taken subject to the objection.
Defendant excepts to the ruling.

A. No.

Cross-examination.

By Mr. ARMSTRONG:

Q. What did you do with the $1,500 that you got from Mr. Burtis?

A. I spent it. I don't remember how soon I spent it after I got it; I didn't keep account. I don't know how long it was after I got it when it was all gone; some six months. It was all spent within a year after the time I got it. There was nothing said at the time I signed the deed to Mr. Burtis—this deed marked Exhibit "D"—about my age. I saw Mr. Redondo on the day the deed was executed at the court-house. Mr. Redondo did not ask me anything about my age.

Q. Do you know how old you are?

By Judge CAMPBELL: We object to that as not proper cross-examination.

By the REFEREE: The same is taken subject to the objection.

A. Yes. Bill was the one that would write my letters before and since the time I made the deed to Mr. Marshall. I do not
106 mean to say that my brother, William Neahr, was attending to my business for me; I only told him to answer and say what I had to say. The money was paid for this Burtis deed in the month of November; I think about two years after the deed was executed; I don't remember. I received the $1,500 about five days, I think, after this deed was executed to Mr. Burtis. I got the money from Phœnix by express—all of it. I had agreed to sell that land to Mr. Marshall before I sold it to Mr. Burtis—a few days before. I had signed a deed to the land to Mr. Marshall before the deed to Mr. Burtis was executed; I don't know how long before,

but a few days, I think. The time Mr. Fickas came down here to get me to sign this deed the deed to Mr. Marshall was at that time in the bank in Phœnix. I don't know what bank it was. I don't know whether it was the Valley Bank of Phœnix. I told Billie to send it. I don't know what bank he sent it to. Mr. Marshall was to pay me for that deed to him—the one that was sent to the Valley bank, and on which he was going to give me $1,500 for the land. The arrangement was that as soon as I would send word to deliver the deed to him he would send me the money, and the deed was to be delivered. I knew about Mr. Burtis wanting to buy the land before the time that Mr. Fickas came down here to get me to sign this deed to Mr. Burtis. He also wrote to me to buy it. I have not any of his letters. Mr. Burtis didn't write any letters to me about
107 buying this land before Mr. Marshall wrote to me. I knew that he wanted to buy the land, because he would write to buy it. That was not after I made the deed to Mr. Marshall. I don't know when it was that Mr. Burtis wrote to me about the land. It was before Mr. Marshall agreed to take the land. They would both write to me. One would offer me $1,300 and then the other one would offer me $100 more, and that is the reason I sold to the other one. Mr. Marshall wrote to me first about it. My brother William had authority from me at that time to sell the land for me; I told him to. I don't remember what the first offer I had for the land was. I would have a big offer, but I don't remember how much. I think it was two days after I had an offer from Mr. Marshall that I had an offer from Mr. Burtis. I don't remember exactly, but he sent me a telegram. When Mr. Marshall came down here the last time to buy this land from me Mr. Davis came and advised me as to my rights in the land at the time I signed this second deed to Marshall. Mr. Marshall and Mr. Davis were present when I signed that deed to Mr. Marshall. My brother William was on the outside. My brother William had not been advising with me in regard to that. He was only an interpreter; that is all. In 1894 Mr. Marshall paid me $100 for the land, and he agreed to pay me $200 more afterwards, if he would win the suit, and if he did not win the suit he would lose the $100.00. Mr. Marshall
108 has offered to pay me this note of $200, the note that he gave when he bought the land (Defendant's Exhibit "D"). He offered to pay me that money when he made the deed. I did not take it because I didn't want to; I didn't need the money. I don't know whether I am mistaken about the date when he offered to pay me the $200. I was offered the $200 for this note in May of this year, but with the condition that in case he won the suit that he was to pay, and otherwise not. He sent it to Mrs. Post, and she offered it to me, and I refused it because I thought that the lot was well sold and I didn't want to get into any scrape. No one advised me not to take that money. I had a talk with Mr. Knight about it, and he said not to take the $200. He did not say that Mr. Burtis would pay me more than that if I did not take it. He didn't say anything about Mr. Burtis paying me money. The reason Mr. Knight came to see me about the $200 was because I wished to

know if I could receive that, if that was well received, and then I sent for him, and I told Billie to call him. I didn't know at that time that Mr. McKnight was Mr. Burtis' lawyer. He didn't tell me that he was. He advised me not to receive the $200. I signed that paper (referring to paper handed her). The paper is not in my handwriting. I don't know whose handwriting it is in. Mr. McKnight took that paper to me.

By Mr. ARMSTRONG: I want this marked for identification.

109 The same was thereupon marked as Defendant's Exhibit "G," copy of which is as follows:

YUMA, *October 7th*, 1895.

To Norton Marshall, Phœnix, A. T.

SIR: I tender you herewith the sum of one hundred and ten dollars in U. S. gold coin, being the sum of one hundred dollars paid me by you at Yuma, A. T., on Oct'r 29th, 1894, and seven dollars lawful interest thereon for one year, and three dollars to cover cost of recording the deed then made by me to you of lot 8, in block 1, Neahr's addition to the city of Phœnix.

I also tender you herewith return of your promissory note for two hundred dollars then made by you to me.

And I demand of you that you execute at my cost a quitclaim deed to me and my assigns of said lot 8, block 1, aforesaid.

The deed of Oct'r 29th, 1894, was obtained by you from me by misrepresentation and without consideration, and I desire to revoke and rescind the transaction and hereby offer to do so, and to return to you your note and the money paid me, with interest and expenses.

Y'rs resp'y, FRIDAY M. NEAHR.

Q. What did Mr. McKnight say to you at the time this paper was given to you?

A. To sign that paper.

By Judge CAMPBELL: We object to the question for the reason that the question is not proper cross-examination nor anything relative to that paper.

By the REFEREE: Taken subject to the objection.

By Mr. ARMSTRONG: You may answer.

A. So that everything would be wound up, so that the suit wouldn't take place, and that is the reason that I sent him back the $100 he had given me, because I thought I had no right to

110 receive it.

Q. Where did you get that $100 that you sent back?

By Judge CAMPBELL: Plaintiffs make the same objection, and, further, it is immaterial and irrelevant.

By the REFEREE: Same is taken subject to the objection.

By Judge ARMSTRONG: Where did you get it?

A. Mr. Burtis paid it to me. I don't know that I sent this paper that I know of—yes, I sent it to Mr. Marshall. I don't know whether

I sent it in the mail to Mr. Marshall. I didn't send it myself, but Mr. McKnight took it with him. I did not give Mr. McKnight the $100 at that time.

Q. Did you ever give Mr. McKnight or any one else $100 to be given back to Mr. Marshall?

By Judge CAMPBELL: We object to that on the same grounds as before, and to all of these questions.

By Mr. ARMSTRONG: Mr. Reporter, you may take this statement: Counsel for defendant makes this statement to the referee: that a lady, believed by him to be the wife of William Neahr, one of the witnesses in this case, is sitting near the witness and attempting to prompt her by speaking to witness, Mary Neahr, as I am attempting to examine her and before she has answered my question.

Referee thereupon requested the lady above referred to to remove her chair and sit in a more distant part of the room; to which request said lady then and there complied.

111 A. No. At the time I signed this second deed to Mr. Marshall, in October of last year, Mr. Marshall said to me that he had good proof that I was not 21 years old when I signed the first deed.

Q. And did you not at that time understand from Mr. Davis that you had a right to do with the land as you pleased, if you were not 21 years of age at the time you signed the first deed to Mr. Burtis?

A. I sold to him because I thought I knew that I was 21 years old, and I thought it was well sold.

By Mr. ARMSTRONG: I ask to have the answer stricken out and rejected as not responsive to the question, and I will ask the reporter to repeat the last question.

(Question above repeated by the reporter.)

A. I sold it because I knew I was of age.

By Mr. ARMSTRONG: Defendant asks to have the answer stricken out and the question repeated to the witness.

(Same question repeated by the reporter.)

A. I don't remember whether he said it to me. Mr. Marshall, Davis, and myself were the only ones present at that time.

Q. Have you not stated to Mrs. Post or to Mrs. Nailor, during the present summer, that Mr. Marshall had always treated you honestly and fairly in this matter?

By Judge CAMPBELL: Plaintiffs object to that as not cross-examination and it is immaterial.

112 Taken subject to objection.

A. No.

By Mr. ARMSTRONG: Have you had any talk this summer with Mrs. Post or with Mrs. Nailor with regard to Mr. Marshall's dealings with you?

By Judge CAMPBELL: That is objected to as not cross-examination and it is immaterial.

Taken subject to the objection of counsel.

A. One woman, she went over and told me to take the $200 from him, and I replied that I had already sent the note back to him. I have not had any talk with either of them, Mrs. Post or Mrs. Nailor, in regard to Mr. Marshall's dealings with me about this land.

Q. Has any one ever said anything to you about Mr. Burtis suing you for the recovery of that $1,500?

By Judge CAMPBELL: We object to that as not cross-examination.

A. Yes; Mr. McKnight said it to me.

Q. When did he say that to you?

By Judge CAMPBELL: Plaintiffs make the same objection as before.

Taken subject to the objection.

A. When he brought that letter to me.

Q. This letter that has been marked as Plaintiffs' Exhibit "G"?

Judge CAMPBELL: Plaintiffs make the same objection.

113 A. Yes; about Mr. Burtis suing me, he only said that if the other one wouldn't lose that he would collect from me the $1,500, and if he didn't gain this suit he would sue me for this $1,500.

Q. Did Mr. McKnight at that time ask you anything about your age?

By Judge CAMPBELL: Plaintiffs object to that as not cross-examination.

Taken subject to the objection.

A. No.

Q. What else did he say to you?

By Judge CAMPBELL: Plaintiffs make the same objection.

Taken subject to the objection.

A. Nothing.

Redirect examination.

By Judge CAMPBELL:

Q. Wasn't what Mr. McKnight said this: that if Mr. Marshall won the suit that Mr. Burtis could sue her for the $1,500, but not that he would sue her?

A. He said that he could sue her. He did not say that he would, but that he could. I mean by the term "well sold" that I had the age to sell. It was well sold—that is, the sale to Mr. Burtis. In my testimony when I have stated that in relation to having sold the land well I refer to the sale to Mr. Burtis.

114 Witness excused.

Mrs. MARY E. POST, a witness recalled on behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I know Mary Neahr. I have had conversation with Mary Neahr during the present year regarding Mr. Marshall's dealings with her.

Q. What did she say?

By Judge CAMPBELL: Plaintiff objects to that as immaterial and irrelevant, and if the facts are to be — on the part of Mary Neahr, it is an impeachment on an immaterial, collateral matter, and the proper foundation has not been laid.

By Mr. ARMSTRONG: The question is withdrawn.

Q. State, Mrs. Post, whether during the present year Mary Neahr has stated to you that Mr. Marshall had always used her honestly in his dealings with her.

By Judge CAMPBELL: Plaintiffs make the same objection.

Taken subject to the objection.

A. She said that he had been honest with her and always done with her as he agreed and done by her and he had agreed.

Q. When did she make that statement?

By Judge CAMPBELL: Plaintiffs object to that for the same
115 reason.

Taken subject to the objection.

A. I think it was in May of this year.

Q. Who was present at the time the statement was made?

By Judge CAMPBELL: Plaintiff makes the same objection.

Taken subject to the objection.

A. None but herself. I walked with William Neahr, with James Neahr, and with Mary Neahr separately. James Neahr said that he didn't know anything about the transaction; that the business had all been done with William and Mary—that is, that he had not attended to the business, but that William had attended to it.

Q. Have you had any further conversation with her during the present month regarding Mr. Marshall's dealings with her?

A. Yes.

By Judge CAMPBELL: Plaintiff objects to that question as immaterial and irrelevant.

Taken subject to the objection.

Q. You may state whether she stated to you then that Mr. Marshall had always dealt honestly with her.

By Judge CAMPBELL: And plaintiff makes the further objection that it is leading and suggestive.

Taken subject to the objection.

A. She said that he had never deceived her and had always done

as he agreed by her. I remember of tendering $200 in gold
116 to Mary Neahr. I made that tender for Mr. Marshall. It was made at their residence, at the Neahr residence. I tendered it to her in gold, $200. She refused to take the money. I said that Mr. Marshall had sent this $200, and that he wished to take up the note, and if they would give me up the note I would give them the $200 sent by Mr. Marshall, and they asked if the cause was settled. I asked them to let me see the note, and they said that he had agreed to pay when the settlement was made, and they declined to do it, and they said that they had been advised not to take it. This was in May of this year. I said, Are you afraid; haven't you confidence in Mr. Marshall? and they said yes; that they had never been robbed by selling land to him: that they had taken it and sent the deed direct to Mr. Marshall, and he had sent them the money by express, instead of sending the deed through a third party, and having the arrangement made for paying on delivery of the deed. I said to them, Are you opposing Mr. Marshall in the matter? and they said No, sir; I hope he will win in the suit; I said to Miss Neahr, Are you going to Phœnix on the trial of the case? and she said, No; I am not subpœnaed. Then he said, I have thought of going out of town to stay for a dew days so that they couldn't find me, but I may have to go. There were no other conditions than those I have stated attached to the tender of this
$200 at the time of my demand for the note that I remember
117 of. I tendered the $200 if she would give me the note. I took the money with me and showed them the money and spread it out before them, and I then asked them to show me the note. I offered it to them. I did it for Mr. Marshall.

Cross-examination.

By Judge CAMPBELL:

Q. Bill Neahr told you that he thought he would leave town so that we couldn't find him on the day of trial, and then you told him that you thought that would be a good thing to do?

A. I don't remember what I said in respect to it. I don't remember that I told him it would be better for him not to be a witness in the case. I asked him if he was going to be, but I don't think I gave him any advice regarding it. I think he has had plenty of lawyers to do that. I don't think he needed any of my advice. He said that he had been advised; that was the reason why he didn't take the money. I went there twice with the money to pay and take up this note. I had the money here for that purpose for two or three months in my possession—that is, I had it on deposit where I could get it any time when they wished to receive it. Mr. Marshall had sent me the money and told me to offer them the money and take the note, and I did as he requested me to do.
I didn't labor very hard to get her to take that money, but I
118 made them a fair tender of it. I asked her why she didn't take it, and she said she didn't take it because she had been advised not to.

Witness excused.

Mrs. NAILOR, a witness recalled in behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I have had a talk with Mary Neahr during the present year, 1895, in regard to Mr. Marshall's dealings with her. I talked with her at her house. Mrs. Post was also present.

Q. State what Mary Neahr said in regard to Mr. Marshall in his dealings with her.

By Judge CAMPBELL: That is objected to on the ground that it is immaterial, irrelevant, and if the answer is sought for the purpose of impeachment of the witness Mary Neahr it is an irrelevant matter and the proper foundation has not been laid.

Taken subject to the objection.

A. Mrs. Post asked her if Mr. Marshall had deceived her in anything, and she said no, and then Mrs. Post said, Did Mr. Marshall
119 tell you that he had made everything all right in every way that he promised you—that he did all that he promised? and she said yes. I had this talk with her Monday before last, in the evening, a little after three o'clock.

Q. Didn't Mary Neahr say to you at that time, or to Mrs. Post in your presence, that Mr. Marshall had always dealt honestly with her?

A. Yes.

By Judge CAMPBELL: Plaintiff makes the same objection as before.

Taken subject to the objection.

A. She said yes.

Cross-examination.

By Judge CAMPBELL:

Mrs. Post at that time took in a tablecloth that was finished and to get another one, and she wanted to show the way it was finished, and from there she went to bring some samples to make another one out of. I went with her to Mary Neahr's and she took a big bundle with her. Mrs. Post took me there. I went there for a pattern and this conversation came up about Mr. Marshall. The way it came up was because I guess she had asked the question about Mr. Marshall in some way or other, and the sister-in-law of Mrs. Neahr said that Mr. Marshall was in town.

Witness excused.

120 H. C. DAVIS, a witness called and sworn on behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I am an attorney-at-law and reside here in the city of Yuma. I am acquainted with Mary Neahr. On or about the 24th day o

April last I was called on by William Neahr, a brother of Mary Neahr, to advise his sister Mary regarding a certain deal she was about to make with Mr. Marshall, the defendant in this case, and I advised her as her attorney at that time. That advice was given at James Neahr's house, where she was stopping at that time. The advice was given in the presence of Billie Neahr, Mr. Marshall, and herself.

Q. State what you advised her to do in the premises.

By Judge CAMPBELL: Plaintiff objects to the question on the ground that that was a confidential communication between the client and her attorney.

By Mr. ARMSTRONG: Well, the question is waived.

By Judge CAMPBELL: We will waive cross-examination of this witness.

Witness excused.

Mrs. LUZ R. BALSZ, a witness called and sworn on behalf
121 of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

My full name is Luz R. Balsz. I live here, east of Phœnix. I have lived in Yuma. I lived there from 1862 to 1880. I was a little girl when I came to Yuma to live. I was then six years old. I knew David Neahr and his family, who resided at Yuma between 1870 and 1880. When I was living in Yuma I lived in the first place, before we moved, I lived about four blocks from the Neahr family, and in 1876 I moved into the same block with them. I remember that it was in 1876 that I moved into the same block with them, because I got married in that year and I moved to my own home. It was in August of 1876 that I moved into the same block with the Neahrs. I saw Mary Neahr in the summer of 1876, when I moved into the same block with the Nea-rs at her house, and I saw her coming over to my house nearly every day. I am pretty sure that she was about three years old at that time. I am satisfied that she was about three years old—just about. I had a talk with her mother about her age.

By Colonel FITCH: Counsel for plaintiff objects to the statements made by the mother of Mary Neahr as hearsay.

A. She told me that she was about three years old, and she had a little boy about a year old, just commencing to walk, that was younger than her, and she told me that she had a baby every
122 two years, and that Mary was about three years old.

Q. Do you remember of the hanging of a Mexican for the murder of a man by the name of Rawhide?

A. Yes.

By Colonel FITCH: We object to that as immaterial, incompetent, and irrelevant.

A. I remember of it; that hanging took place some time in May, 1873. All I know about Mary Neahr's being born, in reference to

the time of that hanging, is that she was born in that summer some time. I don't know the exact time. I have been acquainted with Mary Neahr and the Neahr family ever since. I lived in the same block with them for about three years and then I moved here to Phœnix. I have seen her even since then, when I was in Yuma in the later years.

Cross-examination.

By Colonel FITCH:

I went to Yuma to live in 1862. I lived there from 1862 till 1880, I think. I don't exactly remember the year I came to Phœnix, but I went to Yuma again. I was living one year here and then I went to Yuma again, and then I came here and I have been here ever since. I was married in 1876, and I think that Mary Neahr was about three years old at that time. At that time there was this little boy, about a year old, who was younger
123 than Mary Neahr, in the Neahr family. There was more than one older; she had 6 or 7 older than Mary. There was only one younger than Mary, and that was about a year old. Mrs. Neahr had another child in August, 1877; she had the last child. That makes two younger than Mary, then. The birth of the last one was in August, 1877.

Witness excused.

By Mr. ARMSTRONG: We will offer this deed from Friday Neahr, commonly known as Mary F. Neahr, to Norton Marshall for the property in question, dated October 20th, 1894.

(There being no objection, the same was duly admitted and marked Defendant's Exhibit "D," a copy of which is as follows:)

Warranty Deed.

TERRITORY OF ARIZONA, } ss:
County of Yuma, }

Know all men by these presents: That I, Friday M. Neahr (commonly known as Mary F. Neahr) of the town of Yuma, county of Yuma, Territory of Arizona, for and in consideration of three hundred ($300.00) dollars to me in hand paid by Norton Marshall of Phœnix in the county of Maricopa and Territory of Arizona, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Norton Marshall his heirs and assigns forever all that certain premises described as follows, viz: Lot numbered eight (8) of block numbered one (1) of Neahr's addi-
124 tion to the city of Phœnix, according to the map or plat of said addition on file and of record in the office of the county recorder of Maricopa county Arizona Territory; said premises lying and being situate in the county of Maricopa and Territory of Arizona.

To have and to hold the above-described premises, together with

all and singular the rights and appurtenances thereto in anywise belonging unto the said Norton Marshall, his heirs and assigns forever.

And I do hereby bind myself, my heirs, executors and administrators, to warrant and forever defend, all and singular, the premises unto the said Norton Marshall, his heirs and assigns, against every person whomsoever, lawfully claiming or to claim the same or any part thereof.

And I hereby expressly avoid, revoke and disaffirm a certain instrument of writing by me executed dated the 14th day of October, 1892, purporting to convey said premises to Peter T. Burtis and recorded in Book 31 of Deeds at page 312, in the office of the county recorder of Maricopa county Arizona Territory, said instrument having been by me executed and delivered during my infancy and minority, and I being now of full age.

Witness my hand this 20th day of October, A. D. 1894.

FRIDAY M. NEAHR. [SEAL.]

Signed, sealed, and delivered in the presence of—
O. F. TOWNSEND.

125 TERRITORY OF ARIZONA, } ss:
County of Yuma, }

Before me, O. F. Townsend, a notary public in and for said county of Yuma, on this day personally appeared Friday M. Neahr, commonly known as Mary F. Neahr, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 25th day of October, A. D. 1894.

[NOTARIAL SEAL.] O. F. TOWNSEND,
Notary Public.

(Endorsed:) Warranty deed. Def't's Ex. D. From Friday M. Neahr, commonly known as Mary F. Neahr, to Norton Marshall. Dated Oct. 20, 1894. Filed and recorded at request of Norton Marshall Oct. 29, 1894, at 4.05 p. m., Book 37 of Deeds, pages 55. Neri Osborn, county recorder, by H. C. Meador, deputy recorder.

TERRITORY OF ARIZONA, }
County of Maricopa. }

I, Neri Osborn, county recorder in and for county and Territory aforesaid, do hereby certify that the within instrument was filed for record at 4.05 o'clock p. m. on this 29 day of Oct., 1894, and duly recorded in Book No. 37 of Deeds, records of Maricopa county, Arizona, at pages 55.

Witness my hand and official seal the day and year above written.

NERI OSBORN,
County Recorder,
[RECORDER'S SEAL.] By H. C. MEADOR, *Deputy.*

Filed May 28, 1895.

126 By Mr. ARMSTRONG: I will next offer the original deed from Mary F. Neahr for this property, which we have already filed with the referee.

(Same, being duly admitted without objection, was marked Defendant's Exhibit "E." See page 39 of this Transcript for copy of said deed.)

J. W. WALKER, a witness called and sworn on behalf of defendant, was examined and testified as follows:

Examined by Mr. ARMSTRONG:

I reside here in the city of Phœnix. I am acquainted with the parties plaintiff and defendant in this action. In October or late in September of the year 1892 I had a conversation with Mr. Burtis, plaintiff in this case, in regard to Mary Neahr's age.

Q. You may state what he told you.

By Colonel FITCH: We object to that as immaterial, incompetent, and irrelevant.

A. I went to see Mr. Burtis for Mr. Marshall to borrow some money for him.

By Colonel FITCH: Was the date of this visit fixed?

By Mr. ARMSTRONG: Can you fix the date?

A. The date was on Monday, October 10th, 1892. I told
127 Mr. Burtis that there was a deed in the Valley bank of this city from Mary Neahr, of Yuma, to Mr. Marshall, and that he didn't have quite money enough to pay for the deed, and I asked him if he would make me a loan on the property. Mr. Burtis at that time said that Mary Neahr was not of age; that she couldn't give a deed, etc., and we talked the matter over there, and I told him that he was mistaken in that, and he finally said that he would make the loan. He said that he would have some money paid in on the coming Saturday, and that he would make me the loan on Saturday. This was the same land as is in dispute in this suit. I was getting the money for Mr. Marshall at that time. Mr. Marshall was not here at that time; he was in California. That Mr. Marshall is the defendant in this case. I received and opened mail for Mr. Marshall at that time he was away. I know William Neahr, of Yuma. I know his handwriting.

Q. Did you receive any letters from Mr. William Neahr in regard to this land at that time addressed to Mr. Marshall, while he was away?

A. Yes.

By Colonel FITCH: Plaintiff objects to that as immaterial, incompetent, and irrelevant, and if it is introduced for the purpose of impeaching the witness William Neahr, it doesn't appear that the attention of the said witness, William Neahr, was particularly
128 called to the fact to which this witness is now testifying.

A. I received a letter from William Neahr addressed to Mr. Marshall, asking what he would give Mary for that lot.

By Colonel FITCH: We object to his testifying to the contents of that letter, as the loss or destruction or absence of the instrument is not shown and the instrument is not accounted for.

By Mr. ARMSTRONG: Have you that letter, Mr. Walker?
A. Yes, sir (presenting letter). That is the letter I referred to.

We will offer this letter in evidence.
By Colonel FITCH: We have no objections.
(Same was thereupon marked Defendant's Exhibit "F," a copy of which is as follows:)

AGUA CALIENTE, *June* 13.

Norton Marshall, Esq., Phœnix.

DEAR SIR: Yours was duly to hand. My sister—she is twenty years old, not married. In case if there is any buyer for her lot, I think we can fix that so she can sell it. I am going to Yuma in week more. I came up to brand.

Yours very truly, WM. NEAHR.

F. Neahr, dealer in choice groceries, fruits, and vegetables.

YUMA, ARIZONA, *Oct.* 4, 1892.

Mr. Norton Marshall, Phœnix.

DEAR SIR: I send today the deed to the Valley bank.

Yours very truly, WM. NEAHR.

129 (Endorsed:) Filed October 21st, 1895.

By Mr. ARMSTRONG: Did you receive any other letter from him about that time?
A. Yes; I received that letter and offered them——

By Colonel FITCH: Plaintiff objects to that.

By Mr. ARMSTRONG: You replied to that letter?
A. Yes, sir; I replied to that letter on behalf of Mr. Marshall. I attended to it for Mr. Marshall, for the reason that he was not here. I got another letter from Mr. William Neahr—that is, the letter dated September 29, 1892.

(Letter identified as Defendant's Exhibit "G," copy of which is as follows:)

Yuma City market, Chas. Baker, propr.

YUMA, ARIZ., *Sept.* 29, 1892.

Mr. Norton Marshall, Phœnix, A. T.

DEAR SIR: Yours was duly to hand. Make out the deed and send it to me.

Yours very truly, WM. NEAHR.

(Endorsed:) Filed May 28th, 1896.

This letter was in answer to the letter that I had written for Mr. Marshall, offering Mary Neahr the $1,400 for the property. I directed my letters to Mr. William Neahr—that is, the answer.

130 Q. Do you know anything about the deed having been sent up here?

By Mr. FITCH: The first letter bears no date.

By Mr. ARMSTRONG: When were those letters received?

A. Both of those letters were received in 1892 (F and G). I drew up a deed from Mary Neahr to Norton Marshall and forwarded it to William Neahr at Yuma, and the deed came back shortly after, and I saw that deed myself; it was executed by Mary F. Neahr—that is, the deed to the same property that I went to Mr. Burtis to borrow money on to arrange for the payment of it. That deed laid there in that bank for about ten days. The date of the recording of this deed to Mr. Burtis for this property was on Saturday. Mr. Burtis told me that he would make the loan on Saturday, so I came downtown and met him, and he told me that he was going up the street to fix up some papers. He said, I am going up to the court-house and I will be back in a few minutes and we will fix things up. So I went on down to the tin shop and waited for him until noon, and he didn't come back, and then I went home for my lunch, and after lunch I went back there and waited there until after the bank closed, and then I started up to the office and I met him on the way. He then said to me, I have been called on unexpectedly to use some money and I cannot let you have the money as we have talked. That was on Saturday following the Monday on which he promised to let me have the money.

131 Q. In the meantime what was done in relation to this first deed?

A. On Saturday morning I picked up the paper—our mornings newspaper—and I found that Mr. Burtis had bought the same property and had had the deed recorded for that same land.

By Colonel FITCH: We object to this and ask to have that stricken out, for the witness is continuing to answer in spite of the objection.

A. I went on up to the recorder's office in the morning, and I found out that the same was true.

By Mr. ARMSTRONG: You may strike out all after the beginning of the witness' statement as to what he saw in the newspaper.

Cross-examination:

By Colonel FITCH: I have no questions, but I will offer in evidence the record in the probate court referred to hereinbefore.

By Mr. ARMSTRONG: We object to that as being an affidavit of a person not a party to this suit, and it is taken in another proceeding and in another court.

(Taken subject to the objection and marked as Plaintiff's Exhibit "G," copy of which is as follows:)

FREEDOM NEAHR, duly sworn, says: I am one of the persons named in the document now presented to the court, purporting to be the last will and testament of David Neahr, deceased, and filed on the 7th day of April, 1884. I reside in Yuma, Yuma county,
132 Territory of Arizona, at his residence therein. He was a resident of the town and county of Yuma at the time of his death. He left estate in Yuma and Maricopa counties, Territory of Arizona. I think the value of the estate, both real and personal, would be about twenty-one thousand dollars. The will was given to me by the deceased. I know of no other will, and believe it to be his last will and testament. The heirs of the estate are Freedom Neahr, aged twenty-five years; Freeson Neahr, aged twenty-three; Freeman, twenty-two; Freeborn, twenty-one; Freeling, eighteen; Fanny, sixteen; Freecome, fourteen; Mary F., twelve; Freeland, ten; Freechild, eight; all children of the deceased and Maria Neahr, his wife, on the 20th day of March, A. D. 1884. Deceased was about fifty-eight years *years* of age. At the execution of the will he was of sound and disposing mind.

FREEDOM NEAHR.

Sworn and subscribed in open court this 25th day of April, A. D. 1884.

ISAAC LEVY,
Probate Judge & ex Officio Clerk.

Filed and recorded at request of J. M. Evans, September 24, A. D. 1887, at 3.10 o'clock p. m.

HENRY L. WHARTON,
County Recorder.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. W. Kincaid, county recorder in and for Maricopa county, Territory of Arizona, hereby certify that I have compared the foregoing copy with the record on page 354 of Book 3, Miscellaneous Records of Maricopa County, Arizona Territory, and said page 354 of Book 3, Miscellaneous —, being and containing a portion of a document filed and recorded in my office on September 24th, A. D. 1887, at 3.10 o'clock p. m., in Book 3 of Miscellaneous Records, at pages 351 to 374, and that the same is a full, true, and correct copy and transcript of said page 354 of Book 3, Miscellaneous Record-, now in my office.

Given under my hand and seal of office this 14th day of October, A. D. 1895.

[RECORDER'S SEAL.] J. W. KINCAID,
County Recorder.

(Endorsed:) Filed October 21st, 1895.

133 NORTON MARSHALL, the defendant, was duly sworn and examined, and testified as follows:

Examined by Mr. ARMSTRONG:

I am the defendant in this case. I am acquainted with the plaintiff, Peter T. Burtis. I heard the testimony of Mary Neahr given at Yuma in this case.

Q. Did you hear her statement as to her conversation had with you at the time of the giving of the deed and the execution of the deed to you that has been offered in evidence to the property in question?

A. Yes, sir. I remember the conversation.

By Colonel FITCH: Plaintiff objects. Well, I suppose you are going to follow it up.

By Mr. ARMSTRONG: You may state just what was said at that time, Mr. Marshall, and during that conversation.

By Colonel FITCH: We object to that as irrelevant and incompetent and immaterial, the declarations of the grantor with respect to her conveyances. It cannot be received in evidence, and if it is offered for the purpose of impeaching the witness Mary Neahr, it is not shown that her attention was called to that particular matter.

By Mr. ARMSTRONG: State, first, who was present, and then go on and state the conversation.

134 A. William Neahr, her brother, and I went to Mary Neahr. I told her I wanted to buy this land that is in dispute, and I told her that I would give her $100 in cash and a good note, to become due when I could get a deed—a good deed to the property—this land. She said she would take it, but she didn't want to do anything that would be unlawful. I said to her, Is there a lawyer that you have perfect confidence in here? And she said that she had confidence in Mr. Davis. William Neahr and I went then and asked Mr. Davis to come over and advise Mary Neahr in the matter. He came over, and he told her if she was under age when she sold that property to Mr. Burtis that she could confirm it—that is, and was of age now, she could confirm it to Mr. Burtis and he would own it, or she could disclaim his deed and keep it herself, or she could sell it to Mr. Marshall. She could do just as she wished. He asked her if she wanted to sell it to Mr. Marshall, and she said she did. He then said, Send out for a notary public and it can be done. William Neahr and myself then went and got Mr. Townsend, a notary public here, to come, and he came over, and she executed the deed before Mr. Townsend to me. I said nothing in the presence of Mary Neahr against Mr. Burtis. I didn't say that I

ished to get even with Mr. Burtis. Mr. Burtis wasn't discussed by me at all. That deed she gave to Mr. Townsend. He is the agent of Wells-Fargo Express Company there, and he was to send it up here. She gave it to him and asked him send it to Phœnix. I was to pay the money and a good note in ere to the Wells-Fargo Express Company's office and get the deed; hich I did. She and William together gave the deed to the ress agent of the Wells-Fargo Express Company, Mr. Townsend, send up here by express, to put in escrow.

Q. I want to ask you about this paper. I will offer that paper in vidence or a copy of it if I cannot find it.

By Colonel FITCH: We will stipulate that that paper was given Mr. Marshall on the day that it bears date, or a day or two after, ere in Phœnix by Judge Campbell and myself; that we left it ith him and offered him $100, which he refused.

A. That is right. The amount of money is right and the note as right; but I have forgotten the contents of the paper.

(Admitted by consent and may be marked Defendant's Exhibit H" when produced, being the same paper a copy of which appears on page 109 of this transcript as Defendant's Exhibit "G.")

By Colonel FITCH: No objections.

Cross-examination.

By Colonel FITCH:

Q. What was this property worth at the time you paid Mary Neahr the $100 for it?

By Mr. ARMSTRONG: That is objected to as immaterial, incometent, and irrelevant and not cross-examination.

By Colonel FITCH: At the time you gave her the note?

A. I don't know, but I think from what Mr. Burtis has sold some f it off for and what he got for it at that time would be a fair rice. I don't know the value of it. I think it might have ncreased a little over its value two years before, when I had rranged to buy it for $1,400. I don't know how that is, I am sure. ll property has increased a little, I think. I don't think it was orth any less.

Redirect examination.

By Mr. ARMSTRONG:

Q. There was a little boom in real estate in the fall of 1892, asn't there?

A. Well, there has been booms here a little now and then, but I on't remember about the date, really. I don't remember much bout it. There has been ups and downs in property, I know that.

By Colonel FITCH: I was talking about the time when you tendered this $100 for the property.

A. Yes.

Q. My question was directed to the fall of 1894, at the time you paid this $100.

137 A. Yes, sir; at the time I bought it. That is when I mean. I really don't know the state of the market at that time.

Witness excused.

P. K. HICKEY, a witness called and sworn on behalf of the plaintiff, was examined and testified as follows:

Examined by Colonel FITCH:

My name is Philip K. Hickey. I am a resident of the city of Phœnix, and am the cashier of the Western Investment Banking bank. I have lived in Phœnix ever since December 12th, 1882. Since that time I have been engaged in selling real estate most of the time. I am familiar with the values of real estate in this town. I know the premises known as lot 8, in block 1, in Neahr's addition to this city. I know what the value of that lot was in September or October of last year, 1894. At that time the value of it was about $10,000 as it stood.

Cross-examination.

By Mr. ARMSTRONG:

There was a difference in the value of that property at the time I testified about it 2 years before than and now. It had prob-

138 ably appreciated twofold. The cause of that appreciation was the western movement of improvements in this city, as well as some which were made at the Five Points. I think $10,000 was the market price of that land a year ago last summer. I don't know that a sale could have been effected for that price at that time, but that is what the surrounding property was sold for. If it could be sold at all, it would have been sold at that figure. There was no market for it at that price, for it cannot be sold at any price, but it wouldn't be sold at all unless it sold for that price. It couldn't be sold at that price then any more than it could at present when there is no buyer. There is no buyers here today. It couldn't be sold for any price. That is the price it was held at, I mean. I don't know of any buyers for it today any more than the inquiries for a portion of it, and it was rated at that rate, and it was talked up by parties that were seeking to get to buy it. I think it would be increased about twofold in value. I do not mean it would have been worth about $5,000 in October, 1892, by its being worth twofold. I would say it was then worth about $3,333. I make that by considering that it increased in value about 100 % in each of those years. That would make it about $10,000 now. I am somewhat interested in this property. I bought some of it. I had not contracted to purchase some of it from Mr. Burtis, the plaintiff in this action. I was not

139 engaged in selling this property for Mr. Burtis. I am in no way connected with Mr. Burtis in the matter, excepting that I hold the deed for some of the property that formerly stood in the

name of Mr. Burtis. I have purchased some of this same lot. I purchased it from Mr. Franklin and his daughter. They purchased it from Mr. Burtis; either from him or from Mr. Toohey. I think it came from Mr. Burtis, then through Tookey to me.

Redirect examination.

By Colonel FITCH:

I know Mr. Burtis. He is a man of large means and is responsible for the full amount of my purchase.

By Mr. ARMSTRONG: Defendant objects to that as immaterial.

By Colonel FITCH: There is a warranty deed from him to these other parties, is there not?

A. Yes, sir; for the property.

Defendant objects to that.

Q. It runs from him to you?

A. Well, no, sir; but from the other parties to me—from him in the chain of title under which I hold.

Witness excused.

140 J. W. WALKER, a witness on behalf of defendant, was recalled and upon examination testified as follows:

Examined by Mr. ARMSTRONG:

I am a resident of this city. I am in the real-estate business. I have been engaged in that business here in Phœnix between 8 and 9 years. I am acquainted with the value of real estate in the western part of the city. I have been acquainted with it for the last four or five years. I know the value of lot 8, in block 1, of Neahr's addition to the city of Phœnix. I would place the value of that lot at about $3,000.

Q. State whether there is or there was any change in the market value of that property from September and October, 1892, to September and October, 1894.

A. In 1892 there was quite a little excitement in that part of the city; prices had advanced considerably, but I don't think they have changed since then. I am now offered property in that part of the city at the same price that it was offered to me then.

Cross-examination.

By Colonel FITCH:

Q. What would you place the value of that property, lot 8, in block 1, say, in October, 1894?

141 A. I would say about $3,000.

Witness excused.

Title of Court and Cause.

And now, inasmuch as the foregoing matters do not appear of record in said cause, and the foregoing bill of exceptions having been lodged with the clerk of the said court during said term at which said judgment was rendered, and presented to me for allowance, and having been found by me to be correct, is hereby signed, settled, and allowed and made part of the record therein this 21st day of November, 1896.

A. C. BAKER,
Judge of said Court.

The foregoing bill of exceptions lodged and filed with the clerk this 21st day of November, 1896, at the hour of 3 o'clock p. m.

J. E. WALKER, *Clerk,*
By C. H. KNAPP,
Deputy Clerk.

It is stipulated and agreed that the above and foregoing may be signed by the judge as and for the bill of exceptions in said
142 cause.

THOS. ARMSTRONG, JR.,
Att'y for Def't.
FITCH & CAMPBELL,
For Plaintiff.

Title of Court and Cause.

Assignment of Errors.

Comes now the defendant, Norton Marshall, by Thos. Armstrong, Jr., his attorney, and alleges that there is manifest error in the record and proceedings herein, and prays for a reversal of the judgement herein, and assigns the following errors:

I.

The court erred in ordering judgment for the plaintiff and against the defendant for the reasons that the whole evidence taken together does not warrant or sustain a judgment in favor of the plaintiff or against this defendant.

II.

The court erred in finding and adjudging that the plaintiff,
143 Peter T. Burtis, is the owner of the premises in litigation herein.

III.

The court erred in adjudging that the defendant, Norton Marshall, is not the owner of the lot of land in dispute herein.

IV.

The court erred in adjudging that the deed of the premises in litigation herein, executed by Friday M. Neahr to defendant, Norton

Marshall, of date October —, 1894, is invalid and of no effect, and that the defendant Marshall acquired no title to said premises under said deed.

V.

The court erred in finding and adjudging that the defendant, Norton Marshall, take nothing by his cross-complaint.

VI.

The court erred in rendering judgment in favor of the plaintiff for the reason that all the evidence taken together shows that Friday M. Neahr, the person from whom both parties herein claim title, was an infant and incompetent to make a valid and binding deed at the date of her alleged conveyance to the plaintiff.

144 VII.

The court erred in rendering judgment in favor of the plaintiff for the reason that the evidence shows that Friday M. Neahr, the person under whom the parties hereto claim title, was an infant at the time of the making of her deed to the plaintiff; that no affirmance or ratification of said deed is shown.

VIII.

The court erred in rendering judgment for the plaintiff for the further reason that the evidence shows that said Friday M. Neahr disaffirmed her deed to the plaintiff immediately after coming of full age, and conveyed the premises in dispute to the defendant, and also shows that she retained no part of the consideration received from the plaintiff until she reached her majority.

IX.

The court erred in giving judgment for the plaintiff for the reason that the evidence shows that the plaintiff took his conveyance, under which he claims title, with knowledge that the common grantor of the parties was an infant at the time she executed the said conveyance.

X.

145 The court erred in refusing to grant a new trial of said cause for the reasons set forth in the defendant's motion for a new trial, viz:

First. That the court erred in admitting incompetent evidence on the part of the plaintiff over the objection of the defendant and in rejecting competent evidence offered by the defendant.

Second. That the court erred in that the evidence in the cause does not sustain the judgment herein.

Third. That the court erred in that the judgment is contrary to law.

XI.

The court erred generally in admitting improper evidence offe by the plaintiff; to which the defendant duly objected and t exception, as appears fully in the bill of exceptions.

XII.

The court erred in refusing judgment in favor of the defend as prayed in his cross-complaint.

THOS. ARMSTRONG, JR.,
Att'y for Def'

(Endorsed:) Filed January 5th, 1897. J. E. Walker, clerk.

146 The foregoing transcript was demanded on the 21st day November, 1896, by Thos. Armstrong, Jr., attorney for Nor Marshall, defendant and appellant herein, and is delivered to s Thos. Armstrong, Jr., this 9th day of January, A. D. 1897.

J. E. WALKER,
[SEAL.] *Clerk of District Court, Third Judicial Distric*

Clerk's Certificate.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judi district of the Territory of Arizona in and for the county of M copa, do hereby certify that the foregoing transcript is a comp transcript of all the proceedings in the case entitled Peter T. Bu plaintiff, *vs.* Norton Marshall, defendant, and contains a full a correct copy of all the proceedings had in said cause and of all pleadings, papers, documents, and judgment filed therein, as wel all the evidence received therein.

147 Witness my hand and the seal of said court this 9th da January, A. D. 1897.

[SEAL.] J. E. WALKER, *Clerk*

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, J. E. Walker, clerk of the district court of the third judicial trict of the Territory of Arizona in and for the county of Marico do hereby certify that the appellant's costs in the above-entit action *is* $246.30 and the appellee's costs *is* $53.30.

Witness my hand and the seal of said court this 9th day of J uary, 1897.

[SEAL.] J. E. WALKER, *Clerk*

Appellant.....
Appellee.....

148 In the Supreme Court of the Territory of Arizona.

PETER T. BURTIS, Plaintiff and Appellee,
vs.
NORTON MARSHALL, Defendant and Appellant. } No. 548.

Transcript on Appeal.

Thos. Armstrong, Jr., attorney for defendant and appellant; Fitch & Campbell, attorneys for plaintiff and appellee.

Filed Jan'y 9th, 1897.

J. L. B. ALEXANDER, *Clerk.*

149 In the Supreme Court of the Territory of Arizona.

NORTON MARSHALL, Appellant,
vs.
PETER T. BURTIS, Appellee.

Be it remembered that on the 11th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, to wit:

On motion of Thos. Armstrong, attorney for appellant, it is ordered that the appellant herein be granted until the 15th day of January, 1897, to file briefs herein, and that the appellee herein be granted twenty days thereafter to file his brief herein.

Be it further remembered that on the 13th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had by said court in said cause, to wit:

150 It is ordered that the hearing of this cause be set for January 22, 1897.

Be it further remembered that on the 30th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

This cause came on to be heard on this day, and was argued by Mr. Armstrong, for appellant, and by Mr. Campbell, for appellee, and ordered that appellant have five days to file reply brief after appellee files his brief herein, and on the coming in of said briefs the cause be submitted.

Be it further remembered that on the 23rd day of February, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit:

This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court herein be, and the same is hereby, affirmed, and it is further ordered and adjudged that appellee herein

recover against the appellant herein and J. W. Walker and Niel MacIntyre, the sureties on the appeal bond herein, his costs
151 in the lower court in this cause, taxed at $53.50, and his costs in this court, taxed at $19.50, and have execution therefor.

Be it remembered that on the 10th day of March, 1897, a motion for rehearing was filed in said cause by said appellant, of which the following is a copy, to wit:

In the Supreme Court of the Territory of Arizona.

PETER T. BURTIS, Plaintiff and Appellee,
vs.
NORTON MARSHALL, Defendant and Appellant.

Comes now Norton Marshall, the defendant and appellant in the above-entitled cause, and files this his motion for a rehearing of said cause, and assigns the following as the grounds relied upon by him therefor:

I.

That this court has failed to give due weight and consideration to the facts and the law in this cause, and has thereby been
152 led into the error of finding that the common grantor of the parties, Mary Friday Neahr, confirmed her deed to the plaintiff, P. T. Burtis, after she arrived at the age of 21 years.

II.

That this court has misapprehended the law of the cause in finding that it was necessary for the common grantor to restore or offer to restore the consideration received by her in infancy from the plaintiff before revoking her conveyance to him and conveying to the defendant.

III.

That this court, on consideration of said cause, has overlooked the admitted fact that the common grantor squandered the consideration received by her from the plaintiff during infancy and was unable to restore the same.

IV.

That this court has overlooked the admitted fact as shown by the evidence that the plaintiff, P. T. Burtis, took his conveyance knowing that the grantor was an infant, and also took the same in bad faith as against the defendant.

V.

That the court in considering this cause failed to consider or examine the reply brief of the defendant and appellant at all, which brief the court authorized and allowed to be filed.

153 VI.

The appellant also bases his motion for rehearing upon the fact that this court had not sufficient time in which to consider the law

and the facts in this cause, and that upon reconsideration and consultation and full examination of the law as cited by appellant's counsel there will be, as appellant is convinced, *be* brought to the court's consideration and attention all the law and the facts, and thereby its decision be overruled.

Wherefore appellant prays for a rehearing of said cause.

Appellant also shows that the names of the opposing counsel in this cause are Fitch & Campbell, and their residence is Phœnix, Maricopa county, Arizona.

Dated March 10th, 1897.

THOS. ARMSTRONG, JR.,
Attorney for Appellant.

(Endorsement:) # 548. In the supreme court of the Territory of Arizona. P. T. Burtis, plaintiff and appellee, *vs.* Norton Marshall, defendant and appellant. Motion for rehearing. Filed March 10, 1897. J. L. B. Alexander, clerk.

154 Be it further remembered that on the 16th day of March, 1897, appellee in said cause filed his appearance to appellant's motion for rehearing in said cause, — which the following is a copy, to wit:

In the Supreme Court of the Territory of Arizona.

P. T. BURTIS, Appellee,
vs.
NORTON MARSHALL, Appellant.

Appellee hereby enters his appearance in the matter of the petition for rehearing herein.

FITCH & CAMPBELL,
Attorneys for Appellee.

(Endorsement:) No. 548. Supreme court, Arizona Territory. P. T. Burtis, appellee, *vs.* Norton Marshall, appellant. Appearance. Filed March 16, 1897. J. L. B. Alexander, clerk.

155 Be it further remembered that on the 16th day of March, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit: In this cause it is ordered that motion for rehearing filed herein by appellant be submitted; and be it further remembered that on the 17th day of March, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said cause, to wit: In this cause it is ordered that the motion for rehearing filed herein by appellant be denied.

Supreme Court, Territory of Arizona.

PETER T. BURTIS, Plaintiff and Appellee,
vs.
NORTON MARSHALL, Defendant and Appellant.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

156 Norton Marshall, being first duly sworn, on oath says he is of lawful age, and is the defendant and appellant in the above-entitled action, and is familiar with the land and premises in litigation in said action, and the title and right to possession whereof is in dispute in said action, and to the personal knowledge of this affiant the value thereof, exclusive of costs, exceeds the sum of five thousand dollars, and is of the value of at least seven thousand dollars.

That this affidavit is made for the purpose of truly showing the value thereof to be above five thousand dollars, exclusive of costs, and for the purpose of perfecting an appeal of said cause to the Supreme Court of the United States and showing that said court has jurisdiction on appeal, in so far as the value of the property and amount in dispute is concerned.

NORTON MARSHALL.

Subscribed and sworn to before me this 23rd day of March, A. D. 1897.

THOS. ARMSTRONG, JR.,
[SEAL.] *Notary Public, Arizona.*

Com. expires March 24, 1897.

(Endorsements:) No. 548. Supreme court, Territory of Arizona. Peter T. Burtis, plaintiff and appellee, *vs.* Norton Marshall, defendant and appellant. Affidavit as to amount in controversy.
157 Filed March 16th, 1897. J. L. B. Alexander, clerk.

Supreme Court, Territory of Arizona.

PETER T. BURTIS, Plaintiff and Appellee,
vs.
NORTON MARSHALL, Defendant and Appellant.

The above-named defendant and appellant, Norton Marshall, considering himself aggrieved by the judgment, order, and decree entered in the above-entitled cause in the court above named on the 23rd day of February, A. D. 1897, hereby appeals from said judgment, order, and decree to the Supreme Court of the United States, and prays that this his appeal be allowed, and that a transcript of the record and proceedings and papers upon which said judgment,

order, and decree *was* made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated March 23rd, 1897.

THOS. ARMSTRONG, JR.,
Attorney for Norton Marshall, Defendant and Appellant.

158 And now, to wit, on the 25th day of March, A. D. 1897, it is ordered that the appeal be allowed as prayed for.

JNO. J. HAWKINS,
Asso. Justice and Presiding Justice at Hearing of This Cause.

(Endorsement:) No. 548. Supreme court, Territory of Arizona. Peter T. Burtis, plaintiff and appellee, *vs.* Norton Marshall, defendant and appellant. Notice of appeal and allowance of appeal. Filed April 16, 1897. J. L. B. Alexander, clerk.

Bond.

Know all men by these presents that we, Norton Marshall, as principal, and Neil McIntyre and J. W. Walker, as sureties, are held and firmly bound unto Peter T. Burtis in the full and just sum of one thousand dollars ($1,000.00); to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly be — presents.

Sealed with our seals and dated this 23rd day of March, 1897.

The condition of the above obligation is such that whereas lately, at a session of the supreme court of the Territory of Arizona,
159 in a suit depending in said court between said Peter T. Burtis and said Norton Marshall, a final judgment was rendered against the said Norton Marshall, and the said Norton Marshall having obtained an allowance of appeal and filed a copy thereof in the clerk's office of the said court to reverse the said judgment and decree in the aforesaid suit, and a citation directed to the said Peter T. Burtis, citing and admonishing *them* to be and appear at a Supreme Court of the United States, to be holden at Washington, sixty days after the date hereof:

Now, the condition of this obligation is such that if the said Norton Marshall shall prosecute said appeal to effect and answer all costs and damages if said Norton Marshall shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

NORTON MARSHALL.
NEIL McINTYRE.
J. W. WALKER.

TERRITORY OF ARIZONA, }
County of Maricopa, } *ss:*

Neil McIntyre and J. W. Walker, the persons whose names are subscribed to the above bond as sureties thereon, each by me being first duly sworn for himself and not one for the other, on oath says—

160 That he is a resident householder within the aforesaid county, and is worth in his own right and name the sum of money for which he has signed as surety over and above all his just debts and liabilities and over and above all property exempt by law from execution and forced sale.

NEIL McINTYRE.
J. W. WALKER.

Subscribed and sworn to before me this 23rd day of March, 1897.

A. J. EDWARDS,
[SEAL.] *Notary Public.*

My commission expires March 4th, 1900.

Approved by—
JNO. J. HAWKINS,
Associate Justice of the Supreme Court of the Territory of Arizona.

(Endorsement:) Supreme court, Arizona. Peter T. Burtis, plaintiff and appellee, *vs.* Norton Marshall, defendant and appellant Bond on appeal to Supreme Court of the United States. Filed April 16th, 1897. J. L. B. Alexander, clerk.

161 In the Supreme Court of the Territory of Arizona.

PETER T. BURTIS, Plaintiff and Appellee,
vs.
NORTON MARSHALL, Defendant and Appellant.

Application having been made to the undersigned, Hon. J. J. Hawkins, associate justice of the supreme court of the Territory of Arizona, for a writ of supersedeas in the above-entitled cause, and it appearing that the appellant, Norton Marshall, has obtained an allowance of his appeal herein to the Supreme Court of the United States, and has given a supersedeas bond in the sum required by the judge allowing the appeal, which bond has been approved by the judge allowing the appeal, and a citation having been duly issued, and it appearing to the undersigned that in all things the appellant has perfected his appeal to the Supreme Court of the United States and executed a sufficient supersedeas bond:

It is therefore ordered and adjudged that all proceedings in this cause be from this date stayed in the supreme court of the Territory of Arizona and in the district court from which said
162 cause was appealed, and the orders and judgments rendered therein until the final determination of said appeal in the Supreme Court of the United States.

Done in chambers this 10th day of April, 1897.

JNO. J. HAWKINS,
Associate Justice of the Supreme Court of the Territory of Arizona.

(Endorsements:) No. 548. Supreme court, Arizona Territory. Peter T. Burtis, plaintiff and appellee, *vs.* Norton Marshall, defendant and appellant. Supersedeas. Filed April 16th, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

PETER T. BURTIS, Plaintiff and Appellee,
vs.
NORTON MARSHALL, Defendant and Appellant. } In Equity.

Assignment of Errors on Appeal.

163 And now, on this 23rd day of March, 1897, comes the said defendant and appellant, by Thos. Armstrong, Jr., his attorney, and says that the decree rendered and entered in said cause by the supreme court of the Territory of Arizona is erroneous and against the just rights of this appellant, the said Norton Marshall, for the following reasons:

1. The supreme court of the Territory of Arizona erred in affirming the judgment of the district court.

2. The said court erred in refusing to sustain the errors assigned on the appeal to it from the district court.

3. The said court erred in refusing to reverse the said cause for the errors of the district court assigned.

4. The court erred in ordering judgment for the plaintiff and against the defendant for the reasons that the whole evidence taken together does not warrant or sustain a judgment in favor of the plaintiff or against this defendant.

5. The court erred in finding and adjudging that the plaintiff, Peter T. Burtis, is the owner of the premises in litigation herein.

6. The court erred in adjudging that the defendant, Norton Marshall, is not the owner of the lot of land in dispute herein.

7. The court erred in finding that the title attempted to be
164 conveyed by Friday M. Neahr to the plaintiff, Peter T. Burtis, by deed executed in October, 1892, was otherwise then absolutely void, inasmuch as it manifestly appeared that her right to convey before arrival at majority was restrained and controlled by the conditions of the title under which she held and rendered void any conveyance by her executed before arriving at full age.

8. The court erred in adjudging that the deed of the premises in litigation herein executed by Friday M. Neahr to defendant, Norton Marshall, of date October —, 1894, is invalid and of no effect, and that the defendant Marshall acquired no title to said premises under said deed.

9. The court erred in finding and adjudging that the defendant, Norton Marshall, take nothing by his cross-complaint.

10. The court erred in rendering judgment in favor of the plaintiff for the reason that all the evidence, taken together, shows that Friday M. Neahr, the person from whom both parties herein claim

title, was an infant and incompetent to make a valid and binding deed at the date of her alleged conveyance to the plaintiff.

11. The court erred in rendering judgment in favor of the plaintiff for the reason that the evidence shows that Friday M. Neahr, the person under whom the parties hereto claim title, was an infant at the time of the making of her deed to the plaintiff; that no
165 affirmance or ratification of said deed is shown.

12. The court erred in rendering judgment for the plaintiff for the further reason that the evidence shows that said Friday M. Neahr disaffirmed her deed to the plaintiff immediately after coming of full age and conveyed the premises in dispute to the defendant, and also shows that she retained no part of the consideration received from the plaintiff until she reached her majority.

13. The court erred in giving judgment for the plaintiff for the reason that the evidence shows that the plaintiff took his conveyance, under which he claims title, with knowledge that the common grantor of the parties was an infant at the time she executed the said conveyance.

14. The court erred in refusing judgment in favor of the defendant, as prayed in his cross-complaint.

The appellant therefore prays that the judgment of the supreme court of the Territory of Arizona be reversed.

THOS. ARMSTRONG,
Attorney for Appellant.

(Endorsements:) No. 548. Supreme court, Territory of Arizona. Peter T. Burtis, plaintiff and appellee, *vs.* Norton Marshall, defendant and appellant. Assignment of errors on appeal to Supreme Court of United States. Filed April 16th, 1897. J. L. B. Alexander, clerk.

166 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Peter T. Burtis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 9th day of June, 1897, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Arizona, wherein Norton Marshall is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10 day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

JNO. J. HAWKINS,
Associate Justice of the Supreme Court of the Territory of Arizona.

Due service of the above citation is hereby admitted to have been made upon the plaintiff and appellee above named this 17th day of April, 1897.

JOSEPH CAMPBELL,
Attorneys for the Plaintiff and Appellee, Peter T. Burtis.

167 [Endorsed:] 6. Supreme court, Territory of Arizona. Peter T. Burtis, plaintiff and appellee, *vs.* Norton Marshall, defendant & appellant. Citation. Service accepted April 17th, 1897. Joseph Campbell, attorney for appellee. Lodged in my office this 30th day of April, 1897. J. L. B. Alexander, clerk supreme court of Arizona.

Endorsed on cover: Case No. 16,601. Arizona Territory supreme court. Term No., 388. Norton Marshall, appellant, *vs.* Peter T. Burtis. Filed May 27, 1897.

No. 118.

Brf. of Payson

Office Supreme Court U. S.
FILED
DEC 2 1898
JAMES H. McKENNEY
Clerk.

Filed Dec. 2, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

NORTON MARSHALL, Appellant,
vs.
PETER T. BURTIS, Appellee.
} Appeal from the Supreme Court of the Territory of Arizona.

BRIEF OF APPELLANT.

L. E. PAYSON,
Attorney for Appellant.

HAMILTON & ARMSTRONG,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

NORTON MARSHALL, Appellant,
vs.
PETER T. BURTIS, Appellee.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF OF APPELLANT.

This was an action brought by Burtis against Marshall, December 18, 1894, to quiet the title in plaintiff in the lot of land named, Burtis being in possession, his grantor being Friday Mary Neahr, who executed a deed to him on October 14, 1892, for a consideration of $1,500.

Miss Neahr derived title by deed from her father, David Neahr, on May 9, 1882, which deed contained the "condition" that the land was not to be sold or disposed of until the grantee should reach the age of 21 years.

On October 24, 1894, Friday M. Neahr executed and delivered to Norton Marshall, appellant, a deed for the same lot, in which deed she "avoids, revokes, and disaffirms" the former deed to Burtis, because it was executed and delivered by her during infancy, and she being at the time of this latter deed to Marshall, of full age. (Transcript, p. 59.)

A cross-complaint was filed by Marshall, setting up title in himself under this last deed and infancy of Neahr at date of Burtis' deed; proper issues were made up, evidence taken, trial had in the District Court without a jury, resulting in a judgment for Burtis. (Trans., p. 8.)

An appeal was prosecuted by Marshall to the Supreme Court of the Territory, where, on January 30, 1897, judgment was rendered, affirming the judgment of the court below (Trans., p. 71), and an appeal was taken to this Court.

The judgments in both instances in the courts below were general for the plaintiff below.

It may also be stated here, as a point about which there is no controversy, as is believed, that Neahr spent all the consideration she received from Burtis for her deed to him within six months

after she obtained it, and had none left when she deeded to Marshall. (Trans., p. 49.)

The errors assigned reach every possible phase of the case, and need not be specifically referred to here.

The judgment appealed from, being general, requires an analysis of the case.

The only possible questions may be said to be—

1. That Neahr was of full age when she made the deed to Burtis, October 14, 1892.

2. If not, that she failed to disaffirm within a reasonable time after attaining her majority.

3. That she ratified her deed to Burtis before deeding to Marshall and after attaining majority.

4. That she was estopped to disaffirm, by her own act, in averring her majority in executing the Burtis' deed.

5. That she was bound to restore the consideration to Burtis before an effective disaffirmance.

6. That Marshall, knowing the prior deed to Burtis, could not take title to himself in October, 1894.

The first three propositions present purely questions of fact, and upon this record it is impossible that the court below could have based its judgment upon an affirmance of either of the three.

The last three propositions present solely questions of law, and these it is confidently submitted are only to be resolved in favor of appellant.

Appellant asserts that Neahr was not born until September, 1873; her deed to him was in October, 1894.

Appellee's contention is that she was born in September, 1871; her deed to him was in October, 1892.

1st. Was Friday M. Neahr of full age when she conveyed to the plaintiff, Burtis, in October, 1892?

Ordinarily the presumption would be that one who makes a conveyance is of full age and competent to convey, and the burden of proving non-age would be upon this defendant; but in this case the burden is shifted by the peculiar condition under which the common grantor, Friday M. Neahr, held her title, and also by the pleadings of the plaintiff.

Friday Neahr was given this land by her father David in 1882, upon condition that she should not dispose of the same until she was 21 years of age. (Trans., fol. 32, deed David Neahr to Friday M. Neahr.) The plaintiff also by his pleadings has assumed and placed upon himself the burden of proving Friday Neahr's majority on the 14th day of October, 1892, alleging in his complaint that such is the fact. (Trans., fol. 5.)

1 Greenleaf Evidence, 14 Ed., p. 104, sec. 74.

He assumed this burden all through the trial, as will appear from the testimony of his witnesses introduced on the opening of the

trial. Had he relied upon the ordinary presumption of full age, his course would manifestly have been to introduce his deed and rest upon it until the defendant had introduced his evidence as to minority.

That he failed to sustain this burden the evidence conclusively shows.

The testimony offered by the plaintiff was first that of the witness E. Weiger, who it appears lived in Yuma from 1866 or 1867 to 1873, and in 1871 lived, as he says, in a house adjoining the Neahr's. (Trans., fol. 12.) He testifies that in 1871 there was a female child born to David Neahr, whose name he "believes" was Mary. (Trans., fol. 12.) This witness seems to have been anything but an intimate acquaintance with the Neahr family. He was employed as a clerk by an opposition merchant, and the only time this child or its mother ever was in his house was, as he testifies, one noon soon after the child was born. He left the house next to the Neahr's in the fall of 1871, and left Yuma in 1873, and had never seen the child since, and up to date of the trial, a period of more than 20 years, had resided continuously in California. This witness is able to fix the year of Friday's birth in 1871 only by the fact that some time in that year, or in the year the child he thinks is this one, was born, he copied a paper which he still retains, and which bears upon it the date 1871, without day or month, and which paper he now uses to refresh his recollection as to the year.

The plaintiff's next witness is William or Freeson Neahr, a brother of Friday, who testifies that he is 37 years of age in 1895, and that he "always understood his father to say that Friday was was born in 1871." (Trans., fol. 16.) It will be observed that although this witness is a brother of Friday, and according to plaintiff's theory 13 years older than his sister, plaintiff's counsel failed to examine him as to his own opinion as to his sister's age; and upon cross-examination this witness, 13 years old when his sister was born, has no recollection of the year in which she was born; and this remarkable witness in fact does not know how old he himself is, as develops on his further cross-examination.

The only other witness who testifies on the part of the plaintiff, is one Samuel Purdy, who testifies that when he came to Yuma in 1874, Friday "was running around," and he judged her to be 3 or 4 years old. (Trans., fol. 20.) He fails to state what time of the year he arrived at Yuma, and when he first saw the girl, though he recollects there were other Neahr children about there at the time, and it is very easy for him to be mistaken as to this particular child, he having no intimate relations with the family and no reason to charge his mind with the facts as they existed 20 years before this trial.

This is all the testimony offered by the plaintiff to sustain his contention that Friday Neahr was born in 1871, except the remark-

able deed which the plaintiff received from Friday Neahr in 1892. We say remarkable, because it shows that the plaintiff himself at the time he took it must have had considerable doubt as to the grantor's capacity to make it; otherwise why have the grantor in her acknowledgment affirm that she is 21 years of age, and her brother, Freeson (otherwise William) and Samuel Purdy, the plaintiff's witnesses, annex to it their affidavits; the one that to the best of his *knowledge* and *belief* Friday was 21 years of age September 25, 1892, and the other that when he came to Yuma in 1874, Friday was, to the best of his judgment, three to four years of age?

We say this is all the plaintiff's evidence as to the age of Friday Neahr—there is, however, a certified copy of the record of an affidavit made by another brother, Freedom Neahr, in another proceeding (Trans., fol. 63), which the plaintiff offered and which was objected to as incompetent, wherein this brother testifies as to Friday's age in 1884; but this copy of the record of an affidavit seems so plainly incompetent that its reception in evidence was palpable error, and enough to reverse the case.

Now, in opposition to this sort of evidence, the defendant Marshall offered the testimony of intimate acquaintances of the Neahr family, those who had grown up with the children of that family, women who had children born within a month or two of the time this girl was born—children who were baptized by the parish priest of the Roman Catholic church at Yuma, soon after birth, and of whose baptism and birth a church record was made. The church records were offered and received to corroborate the testimony of these witnesses, and do corroborate them. Almost every witness sworn by the defendant as to his or her recollection of the year of the birth of Friday Neahr, was able to call up some fact of public notoriety or produce some documentary evidence of highest and unquestioned veracity, to tie his testimony to, and their testimony completes such a perfect chain that after a review of it we believe this court must conclude that there remains no doubt that Friday Neahr was born in 1873, and if so the deed to Burtis was executed while she was an infant.

Mrs. Trinidad Muzzy, a resident of Yuma for 25 years, and who knew the Neahr family well, testifies that on the 26th of December, 1872, she purchased a lot in Yuma and built upon it a restaurant which she opened for business on February 22, 1873; that the Neahr family were customers at her restaurant until some time in July of that year, when Mrs. Neahr, owing to her condition was not able to come longer (Trans., fol. 23), and that in September this child Friday was born. (Trans., fol. 23.) This witness also says that in September of that year David Neahr celebrated the birth of his daughter Mary "by treating the boys there until late in the evening," and in a few weeks Mrs. Neahr came to the restaurant with the child in her arms, and, as the witness says, "they have

called her little Mary ever since." That there may be no mistake as to this date, the witness produced in court her deed of the restaurant lot, which is dated December 26, 1872, and is to be found at folio 24 of the transcri pt; and she says she knows the year in which these things took place was that in which she opened her restaurant.

Mrs. Eliza Weber, who had resided in Yuma for 31 years—ever since her birth—testified that she lived near the Neahr's at the time Friday was born; that her brother James (Jones) was born in the same year, and that she carried her brother over to the Neahr's to see Friday very soon after she was born. (Trans., fols. 26–27.) This brother the witness testifies was baptized in the Catholic church at Yuma not later than a month after his birth, under the name of Santiago Jones (the Spanish for James) (Trans., fol. 27), and when we come to the testimony of Father Gheldof, the parish priest, we find that the records of the church at Yuma show that on the 30th day of July, 1873, there was publicly baptized James, the son of Eliria Armenta, born the 15th day of July, 1873. And it appears also from Mrs. Weber's testimony that her mother's name, the mother of this boy James, was Eliria Armenta. (Trans., fol. 26.) This witness was a playmate of the Neahr children, and, as she says, was with them nearly every day. There was another event that occurred in Yuma that year which strongly impressed itself on the minds of all who were living there at the time and old enough to appreciate it, and that was the judicial execution of a Mexican for murder. This execution took place on the 2d day of May, 1873, as appears from the court records of said Yuma county, and this witness, Mrs. Weber, remembers it and states that the child Friday was born after that hanging. (Trans., fol. 27.)

Mrs. Downey, who has also already resided in Yuma since 1864, recalls the year of the birth of Friday Neahr, whom she has known ever since she was born, by the fact that a son was born to her in the same year, viz: on June 13, 1873. (Trans., fol. 32.) This son was was also baptized in the Catholic church and public record of his birth in evidence shows that he was born on the date fixed by this witness in 1873. (Trans., fols. 32, 33.)

We emphasize these two events as they were facts which, as a basis for statement, were absolutely impregnable.

The mother of this witness worked for Mrs. Neahr at the time Friday Neahr was born (Trans., fol. 34), and the circumstances of Friday's birth and being of about the same age as her child, are impressed on the witnesses' minds by this and by the fact that Friday's mother took her (the witness') babe and nursed it at her own breast. This witness also recalls the hanging of the Mexican and fixes it before the birth of her child or of Friday Neahr. This witness also contradicts the plaintiff's witness Weiger, as to his place of residence when Friday Neahr was born and shows that Mr.

Weiger is mistaken as to his recollection of his place of residence at that time.

Mrs. Rosa Silva, mother of the witness Mrs. Downey, corroborates her daughter's testimony as to the date of the birth of Friday Neahr, fixing it in 1873. (Trans., fol. 34.) She, it seems, was a midwife and "assisted," as she says, at the birth of a number of other children born the same summer that Friday Neahr was; one of these was her grandson, the son of Mrs. Downey, another the brother of Mrs. Weber, both of whose baptismal records are in evidence herein, showing them to have been born in 1873. She recalls the fact that she went from her daughter's, after her son was born, to Mrs. Neahr's, and remained with her until a few days before Friday was born, and four days after her birth saw the child, who she says was called Mary, and whom she has known ever since. (Trans., fol. 35.)

Here, then, are three witnesses who cannot well be mistaken as to the date of this child's birth—all intimate acquaintances of the family, and knowing the child from her birth, their testimony fixing the date of birth of Friday Neahr by the birth of children in their own families who have grown up with Friday Neahr, and as to whose ages they cannot well be mistaken, even though there was not the unchallenged public record of the church showing their ages.

Some objection was made to the introduction of the church record in evidence, and here is perhaps the proper place to dispose of that objection. It was shown by the testimony of Miss Mary Post, who resided in Yuma in 1873, that Father Chaucot was the priest in charge of the Catholic church at Yuma that year (Trans., fol. 29); the record offered is signed by Father Chaucot, and was kept in his handwriting in the Spanish language (Trans., fol. 36). That it is in his handwriting is shown by the testimony of Father Gheldof, the priest in whose possession the record is (Trans., fol 36), and who succeeded Father Chaucot. The book containing this record was offered for the inspection of the court below, and was sworn by its custodian to be the record of baptisms kept by the church at Yuma according to the custom of the Roman Catholic Church (Trans., fol. 36).

That records of this character, thus authenticated, are competent to prove the facts stated in them has been held by the best of authority in this country.

Kennedy *vs.* Doyle, 10 Allen, 161.
Witcher *vs.* McLaughlin, 115 Mass., 167.
Cited, 1 Gr. Ev. (14 ed.), 160, note (*a*).

But this is not all the evidence that the defendant offered as to the year of the birth of this girl.

Two ladies, sisters, who have lived in Yuma most of the time since childhood and have known Friday Neahr since seeing her first as an infant in arms—Mrs. Caroline McIntyre and Mrs. Nailor—testify positively as to her having been an infant less than a year old and still carried in a nurse's arms in the spring of 1874. These two witnesses were then young girls going to a school kept by Mr. and Mrs. Nash (Trans., fols. 36, 37), and this school was in the next house to the Neahr's, only a fence between. This year, 1873–74, was the only year that the Nash's taught school in Yuma, commencing in October, 1873, and closing in the summer of 1874, they filling the interim of teaching of Miss Post.

Miss Post came to Yuma in April, 1872, and was acquainted with David Neahr and his family, but has no distinct recollection of Mary (or Friday) until she came to school to her in the spring of 1878 (Trans., fol. 38), when Friday was, according to Miss Post's understanding, under school age. She cried a good deal and had to be sent home in charge of one of her brothers (Trans., fol. 38), and by the school age at that time Miss Post means six years.

Miss Post's testimony is well worth careful consideration; it is given by a lady who for 25 years has been a teacher in the public schools of Yuma, and from it this Court must see that she is a lady of good judgment, education and more than average intelligence. Her testimony also fills a very important place in this case, for it serves to bind together and corroborate, as to the date herein in question, the testimony of several other witnesses. For example: Miss Post knew Father Chaucot, the parish priest, whose records are here introduced, to have been such priest when those records were made. She taught the school at Yuma during the school term of 1873, leaving Yuma in July, 1873, to take to San Francisco and place in an orphan asylum the sisters of the twins who Mrs. Rosa Silva testifies were born at Antelope in the spring of 1873. The mother of the twins died, and Miss Post, as stated, took their sisters to San Francisco in July, 1873, and returned the next year, and during her absence Mr. and Mrs. Nash taught the school which Mrs. Nailor and her sister, Mrs. McIntyre, attended, just as these women testified, as we have before stated. Miss Post's testimony is, therefore, most important in the way of corroboration, as well as in her estimate of Friday's age when she first came to school to her.

Other witnesses gave important testimony bearing upon this question, among them O. F. Townsend of Yuma—Wells-Fargo's agent there—who testified that he had known the girl since 1874, and was very intimate with her father. (Trans., fol. 41.) This witness was in David Neahr's store when the doctor who attended Mrs. Neahr at the birth of this child came down to inform the father of the event, and recollects the father's remark, "We will have to open some wine; it's another girl." Mr. Townsend recalls the date from its being *in the same year the Mexican was executed at Yuma*, and

also from his recollection of the physician, Dr. Mix, having left Yuma the same fall or winter. (Trans., fol. 41.)

The execution of the Mexican was in May, 1873. (Trans., fol. 43.)

Mrs. Balsz, now living in Phœnix, was a resident of Yuma from 1862 to 1880. She lived not far from the Neahr family, and in 1876 married and moved to the same block with them. (Trans., fol. 57.) When she moved into that block Mary (or Friday) Neahr came to her house nearly every day, and seemed to her to be about three years old. Mary's mother also told this witness that Mary was then (1876) three years old; that her children came every two years, and then she had a little boy just learning to walk. Mrs. Balsz cannot well be mistaken as to this date, for it was the year of her marriage.

This is all the testimony from those who have known this girl ever since her birth; but in corroboration of it all comes the witness, J. W. Walker, who testifies that the plaintiff, Burtis, himself stated to him only a few days before he took his deed in 1892, that "Mary Neahr was not of age" (Trans., fol. 60); and the plaintiff has not denied the making of this statement, so it stands uncontroverted, that the plaintiff himself knew his grantor was an infant.

Under this testimony, does it seem possible to come to any other conclusion than that Friday Mary Neahr was born in the year 1873, and not in 1871, as contended by the plaintiff? Friday Neahr herself was sworn as a witness on the part of the plaintiff, Burtis, but was not interrogated as to her age by either party. Her brothers, William and James, were also witnesses, but neither can state positively his own age, much less could they that of their sister; and the only other witnesses who testify to her having been born prior to 1873, are Mr. Weiger, who, as stated, removed from Yuma more than 20 years ago, and had not seen her during all that time—and Samuel Purdy, who saw Yuma first in 1873, and believes she was then three years old, though it is difficult to understand why Samuel should have charged his mind during all these years with this one child's age and appearance 21 years before the trial of this cause. Records and documents, public events, marriages or the birth of relatives enable every witness sworn for the defendant to fix the year in which this child was born; these documents and the church record are produced in court, and not a suspicion rests upon any of them, nor is there anywhere a suspicion cast upon a single witness as to his veracity and sincerity. That women are more apt to fix dates of birth correctly than men is a matter of common observation, and it is no more likely that all these women who have testified for the defendant herein as to Mary Neahr's birth in 1873 are mistaken by two years than that they are mistaken as to their own marriages and the dates of birth of their own children or close relatives. And lastly, and as important as anything else in the case in the way of testimony, is the

undisputed declaration of the plaintiff himself made to the witness Walker that he knew the girl was not of age when he took his deed from her in 1892. The plaintiff's deed, with all of its unusual and unheard of declarations of full age attached, is also important as showing the plaintiff's suspicion that the girl might be under age, or at least her majority was so doubtful that it was necessary to have it sworn to.

2. Did Friday Neahr fail to disaffirm her deed to the plaintiff within a reasonable time after reaching majority?

If our contention be established that she came of age September 25, 1894, it will hardly be contended that a disaffirmance of her acts as an infant made within the following month is unreasonable delay. There is no proof that she was guilty of any laches; she resided a long distance from the land in question, and there is no proof that she ever saw it, much less that any improvements were put upon it to her knowledge, which courts have held to be a circumstance to be shown in bar of an infant's right to disaffirm.

3. Did Friday Neahr ratify her deed to the plaintiff before she deeded to the defendant?

It will be contended here by plaintiff's counsel, as in the court below, that at the time Friday Neahr made this deed to the defendant, Marshall, she told him she had before that time sold the land to Burtis, and this they say is an affirmance.

The only statement of this sort anywhere in the evidence is to be found in the testimony of Friday Neahr, where she says, "I told him I didn't want to go back on it (the deed to Burtis); that I didn't want to get into any scrapes, and that I thought I had the age to sell—that it was sold well." (Trans., fol. 48.)

Page 53 she says, "I mean by the term 'well sold,' that I had the age to sell." This statement, if it ever was made to the defendant, and the defendant denies it being made, further than that she told him she "didn't want to do anything unlawful" (Trans., fol. 64), counts for nothing in our view of the law.

It will appear from the testemony of both Mary Neahr and the defendant that this language, if used at all, was used in a conversation which resulted in the making of a deed to the defendant (Trans., fol. 58), and it can hardly be claimed that taking one sentence out of a conversation of which a resultant act is a solemnly executed conveyance, will be allowed to operate as an affirmance or dissaffirmance of the conveyance itself. It appears that Mary Neahr sought and received counsel from a lawyer in whom she had confidence before she executed this deed of disaffirmance. (Trans., fol. 50.) Mr. Davis was called in at her request, and he advised her that if she was under age when she signed the deed to Burtis, she could affirm it, revoke it and keep the land herself, or could sell it to Mr. Mar-

shall. (Trans., fol. 56.) She chose to sell to Mr. Marshall and to revoke her former deed made, as she states in the Marshall deed, during her minority—this is the affirmance of Burtis' deed, as claimed by plaintiff.

But what is held by the courts to constitute a ratification of an infant's deed, and what not? Some of the things which courts have held to amount to a ratification are: The giving of another deed to the original purchaser, taking a lease of the land, receiving payment of a part of the purchase money then unpaid, standing by and seeing valuable improvements made on the premises, allowing the purchaser to occupy for so long a time that her assent is to be presumed. Any one of these things, if done or suffered after the minor came of age, we concede would bar her right to revoke the deed made in infancy.

In this case nothing more is claimed than that she notified the second purchaser that she had formerly conveyed the land to another; but upon his stating that she was not of age when she made the first deed, and after being advised by her own attorney as to her rights, she made the second deed.

That an infant did after majority voluntarily and deliberately recognize the deed made during infancy as an actual conveyance of his right, is not a bar to his revocation or disaffirmance of the former deed, is held to be good law by as high authority as the Supreme Court of the United States.

Tucker *vs.* Moreland, 10 Peters, 69, 74, 75.

The mere recognition of a fact that a conveyance has been made is not *per se* proof of the confirmation of it.

Id. (75).

Also, page 76: "The act of affirmance must be of that solemn, unequivocal character as to establish a clear intention to confirm the deed after a full knowledge that it was voidable."

So, also, if the second purchaser is aware of the first conveyance, it is no bar to his taking title; neither is it a fraud to make, or the second purchaser to take, the last conveyance. If the second purchaser is aware of the first conveyance, and of the circumstances under which it was executed, he then knew that Mary was not bound by it, and was competent to revoke it and give another deed.

Jackson *vs.* Burchin, 14 John, 124.

Tucker *vs* Moreland, 10 Peters, 69.

In the Jackson case (N. Y.), the infant grantor was produced as a witness on the part of the defendant. His testimony that before executing the second deed, after he came of age, he had refused to sell because he had already made a deed in infancy, was held improper.

If the rule were that a minor could disaffirm only by sale to one who had no knowledge of the previous conveyance, then there could be no disaffirmance in a state wherein the registry laws are in force.

In this case has not the minor within due time after attaining majority taken the proper legal course to disaffirm? It is universally held that the second deed, executed after attaining majority, is a disaffirmance of the one executed in infancy, if executed in time. Mary Neahr arrived at full age in the latter part of September, 1894. October 4, 1894, she made this deed to Marshall; and in it the Court will observe she expressly revokes the former deed to Burtis, and warrants the title. If the rule as laid down by the Supreme Court of the United States is to be observed, the only method by which minor's deed can be affirmed is by making another affirming, or by some act "of such solemn and unequivocal nature as to establish a clear intention to confirm the deed after a full knowledge that it was voidable." Here the only act of the infant after she comes of age is her express and positive disaffirmance and revocation by a deed executed with all the solemnity of the one executed in infancy; and can it be said that because this person had said in the same conversation that she had sold the land before, that she thereby, and by so trivial a proceeding, so bound herself that she could not disaffirm by her deed? As the court said in Tucker *vs.* Moreland (76), there must be some distinct act by which the infant "receives a benefit from the contract after he arrives at age, or does some act of express ratification."

See Irvine *vs.* Irvine, 9 Wal., 617.

Can this Court say that it will take part of a conversation, out of its connection, and give effect to it, when the conversation taken as a whole results in a specific written deed, duly executed and acknowledged, which would be avoided and set at naught were the prior portion only of the conversation taken?

We respectfully submit that no act of Mary Neahr's has been proven which would amount to a ratification of her deed to Burtis, while, on the other hand, express disaffirmance of such a deed has been offered in evidence.

4. Possibly the question of the estoppel of Mary Neahr to deny her first conveyance may be claimed by plaintiff's counsel, on the ground that she represented herself to be of age when she made the first deed. This we think the plaintiff can hardly claim, in view of the undisputed testimony of J. W. Walker, who swears that Burtis told him before his deed was made that Mary Neahr was not of age; also by the extraordinary affidavits attached to his deed, whereby he seeks to bolster up an instrument which he had every reason to suspect was voidable, and being made by an infant.

The doctrine of estoppel does not apply to the acts of infants.
Lackman *vs.* Wood, 25 Cal., 1 & 7.

A grantor is not estopped from disaffirming her deed on the ground of infancy by a false recital in the deed that she was unmarried and of age.
Simms *vs.* Everhard, 102 U. S., 300.
Weiland *vs.* Kobick, 110 Ills., 16.
S. C. 51 Am. Rep., 676.

In equity the same doctrine applies:
Baker *vs.* Stone, 136 Mass., 405.

A conveyance by an infant is an assertion of the right to convey; a contemporaneous declaration of his age adds nothing to that implied by his deed. An assertion of estoppel against him is but a claim that he has asserted or contracted; but he can no more do that effectively than he can make the contract alleged to be confirmed.
Simms *vs.* Everhard, 102 U. S. (313).

This case is similar to ours in this, that the infant signed a statement that she was of full age, when she made the deed.
Id., p. 301.

Where the purchaser is cognizant of the facts, he cannot claim an estoppel on the ground of fraud, because he has taken the chances of his title.
Davidson *vs.* Young, 38 Ills., 152.

It is useless to pile up further authorities; there are some few, undoubtedly, against the position assumed by us herein, but they can have no effect upon the judgment of a Territorial court, bound, as it is, by the decisions of the United States Supreme Court, which has made a positive declaration that an estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity.
Simms *vs.* Everhard, 102 U. S. (313).

5. Was it necessary for Friday Neahr to restore the consideration received by her in infancy for the deed to Burtis before disaffirming and conveying to another?

The testimony of Mary Neahr shows that she did not have any part of the consideration paid by Burtis when she became 21 years of age in September, 1894. She herself says she spent it all within a very short time after she received it in October, 1892. (Trans., fol. 49.) Under these circumstances, then, does the law require of her the restoration of the consideration received and squandered in infancy? If it does, then as was said in Harvey *vs.* Briggs, 8 So. Rep., 274 (276), "Such a rule practically strikes down the shield

which the law, by reason of his inexperience and youth, throws around the infant." "If he has lost or squandered the consideration during minority, this is nothing more than the law expects of him, and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate."

Brantly *vs.* Wolf, 60 Miss., 420,
quoted in Harvey *vs.* Briggs, 8 So. Rep. (276).

This case is especially called to the attention of the Court, as it expressly overrules the dictum in the earlier Mississippi cases of Hill *vs.* Anderson, 5 Smedes & M., 216, and Ferguson *vs.* Bobo, 54 Miss., 121, quoted by some text-writers, and by counsel for plaintiff herein, in support of the broad proposition that in all cases the infant must place his grantee in *statu quo* before rescinding. The very latest text-writer thus lays down the rule: "If the consideration received is still in some tangible form in the hands of the grantor or his heirs who come to disaffirm, it ought to be tendered back, but if it has been wasted or lost it need not be restored or tendered back; for the inability of infants to take care of the proceeds of their lands and the likelihood of their being cheated out of their money is one of the main reasons for the law which disables them from a binding deposition of their lands."

1 Dembitz on Land Titles (1895), p. 423 and note.

It must be borne in mind that the plaintiff herein makes no claim that Mary Neahr retained any portion of this consideration until she reached majority, and her own testimony shows that the plaintiff has taken the proper view of the matter and threatened her with a suit for money paid if he fails to recover in this suit (Trans., fol. 53.)

While it is true that dicta may be found wherein the rule is stated to be that in order to recover his lands or rescind his executed contracts, an infant must restore the consideration received whether he has it after reaching majority or not, we submit that the great weight of authority is the other way, and should in reason be so, so long as infants are protected by the law. We can quote extracts from only a few cases, e. g.:

"The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity, and if he were required to restore an equivalent where he has wasted or squandered the property or consideration received the privilege would be of no avail."

Craig *vs.* Van Bebber, 13 S. W., 906, Mo.

In a note to this last-cited case as republished in 18 Am. St. Rep., p. 678, the authorities are gathered and brought down to the date of the decision (1890), upon all questions arising from infancy.

In Massachusetts the courts hold, "If the consideration has passed from his (the infant's) hands, either wasted or expended during his minority, he is not therefore deprived of his right or capacity to avoid his deed any more than he is to avoid his executory contracts."

Chandler *vs.* Simmons, 97 Mass., 508.
S. C. 98, Am. Dec., 117–122.

The Supreme Court of the United States also lays down the same rule in these words:

"If during infancy he has wasted, sold or otherwise ceased to possess the property, these acts cannot be a bar to his recovery."

"To give effect to such disaffirmance it is not necessary that the infant should place the other party in *statu quo*."

Tucker *vs.* Moreland, 10 Peters, 58–74; 1 Am. Leading Cases, 237–319, top.
Mississippi—Harvey *vs.* Briggs, 68 Miss., 60, and 8 S. Rep., 274.
Missouri—Lacy *vs.* Piscler, 25 S. W. Rep., 206.
Pennsylvania—Ruchizky *vs.* De Haven, 97 Pa., 202.
Virginia—Mustard *vs.* Wholford, 76 Am. Dec., 209.
Maine—Boody *vs.* McKenny, 23 Me., 517.
New York—Green *vs.* Green, 69 N. Y., 553.
Minnesota—Dawson *vs.* Holms, 30 Minn., 107; 14 N. W. Rep., 462.
Kentucky—Vallandingham *vs.* Johnson, 85 Ky., 288; 3 S. W. Rep., 173.
Arkansas—Stull *vs.* Harris, 51 Ark., 249; 11 S. W. Rep., 104.
Illinois—Reynolds *vs.* McCurvy, 100 Ills., 356.
Nebraska—Englebert *vs.* Troscell, 58 N. W. Rep., 852.
Indiana—Carpenter *vs.* Carpenter, 45 Ind., 142.
Ohio—Cresinger *vs.* Welch, 15 Ohio, 156–195.
Alabama—Manning *vs.* Johnson, 26 Al., 446; 62 Am. Dec., 732.
Vermont—Price *vs.* Furman, 27 Ver., 268: 65 Am. Dec., 194.
Massachusetts—Chandler *vs.* Simmons, 97 Mass., 508.
Nebraska—Bloomer *vs.* Nolan, 53 N. W., 1039.
Schouler Dom. Rel., Sec. 446 and Note 2, p. 633, and Note 8, p. 635.

Even in those States where by statute the infant is required to restore the consideration received before revoking his conveyance made to a purchaser in good faith believing him to be of age, it is distinctly and positively held that if the purchaser deal with the infant, knowing him to be an infant, he is bound to know that the infant might at any time rescind without restoring what had been received.

Shaul *vs.* Rinker (Ind.), 38 N. E., 593 (594).
Simms *vs.* Everhard, 102 U. S. (311), Indiana case.

And where he has squandered the proceeds in infancy, he may nevertheless disaffim and recover back the property.

Leacox *vs.* Griffith, 40 N. W., 109, Iowa.
Jenkins *vs.* Jenkins, 12 Ia., 195.

6. It will probably be urged by the plaintiff that the defendant was not in position to take title to this property by his deed of Oct. 20, 1894, because he knew of the prior deed.

We admit that he knew of the prior deed—so did everyone else. The world at large was bound to take notice of it, for it had been duly recorded in the office of the County Recorder of Maricopa County. If this doctrine is to apply, a minor can never revoke a sale made during infancy; he cannot sell to anyone, for everyone is bound by the knowledge the public record presumes him to have of the prior conveyance.

The authorities upon this point have been cited in this brief under the head of ratification (ante P.), and it is not necessary to repeat them here.

But the appellee may claim that some fraud was perpetrated upon the girl Friday Neahr, whereby she was induced by false and fraudulent pretenses to sign a deed to the defendant without consideration, and the contents of which were unknown to her.

The testimony of all the parties present at the making of this deed is before the court—not a syllable is to be found anywhere showing that she was not fully aware of its contents; in fact, her own testimony shows that she advised with her own attorney before she signed it (Trans., fol. 50), and after that sent out for a notary to take her acknowledgment. Her attorney, Davis, did advise her (Trans., fol. 57). Neither does Friday Neahr make any complaint that there was any fraud perpetrated upon her when she signed the deed to Marshall. It is true Mr. Marshall only paid her $100, and agreed to pay $200 more when he should obtain possession of the land. She accepted this consideration knowing that the conveyance meant this litigation, which must be met and carried on at a large expense, which she was probably unable to bear; and we do not find that she ever made any complaint until the plaintiff's attorney, Mr. Knight, went to her after this suit was commenced and threatened her with suit to recover the money paid to her by Burtis and squandered during her infancy; then we find that, under such pressure, on October 7, 1895, a year after the deed was made, she signed the document in evidence at folio 51. Not until then, and under that pressure, did Friday Neahr, discover that she had been induced to convey to Marshall by a misrepresentation. In this document, which she says she did not write, but which she signed because Mr. Knight told her to (Trans., fol. 51), she says she tenders back to Mr. Marshall the $100 and his note paid by him for the land; but it appears that she herself had nothing to do with the tender; that it was the plaintiff

in this case who made the tender, and who furnished the money to make it with (Trans., fols. 51, 52). So it appears that it is this plaintiff who is dissatisfied with the deed to Marshall, and who is endeavoring to revoke the deed made by Friday Neahr, after attaining full age. He is hardly in position to claim to act for Friday Neahr, or to take advantage for himself to her right to claim a fraud in this action. Friday Neahr is not a party to this action, and is not asking any relief herein.

The only testimony offered by the plaintiff upon which he can even claim to base any allegation of wrong-doing by the defendant in obtaining this second deed, is that of Friday Neahr wherein she states that she told Mr. Marshall she didn't want to go back on her previous sale; that she didn't want to get into any scrapes, and thought she had the age to sell; but on his telling her he had good proof that she was not of age, and after being advised by her attorney as to her rights, she did make the deed. The brother Freeson (or William) Neahr was present at a part of this transaction, and adds to the testimony of Friday that Mr. Marshall said he "wanted to get even with those parties; that they was playing him a dirty trick, and he had evidence she was not of age, and in that way he would get even with the parties." This witness explains on his cross-examination what he means by the dirty trick he says Mr. Marshall spoke of, though it will be found that Mr. Marshall in his testimony denies having used any such language; and it is well, perhaps, for the Court to know just what was meant by this, though we do not regard it as material to this case whether Marshall took the deed "to get even" or not, so long as he has it and paid for it, and is claiming under it. His motives in buying this land are hardly a fit subject of inquiry in this action. If the Court cares to look into the original means by which the plaintiff Burtis obtained this land from this girl, it will be found succinctly stated in the testimony of Mr. J. W. Walker, commencing at folio 60 of the transcript. There it appears that in 1892 Mr. Marshall had arranged to purchase this land from Friday Neahr for $1,400; the deed to him was in the bank for delivery, but he did not have quite enough money to pay for it; he sends Mr. Walker to Burtis to borrow it, and tells him what he wants it for. Burtis promises to let him have the money, although he says Friday was not of age (Trans., fol. 60), but put him off for a week, until he could send his (Burtis') agent to Yuma and buy it for himself, which he did for $100 more than Mr. Marshall was to pay. Burtis then took advantage of the knowledge he obtained from Walker as to Marshall's intended purchase, and by the "dirty trick," as William Neahr says, got it for himself. Marshall procures his proofs as to Friday's minority and waits until she is of full age, and then obtains the property by purchase.

These are all the facts, and upon them all it seems to us the Court

must find: 1, That Friday Neahr was an infant when she made the deed to Burtis in 1892; 2, That she never ratified or confirmed it; 3, That she spent the consideration received from Burtis during infancy, and was under no obligation to return it as a condition of revoking her deed; 4, That she did revoke her first deed within reasonable time after coming of age; and, 5, That the title to this land is now in the defendant Marshall.

We therefore ask the Court to reverse the judgment of the court below and remand the case.

All of which is respectfully submitted.

L. E. PAYSON,
Attorney for Appellant.

HAMILTON & ARMSTRONG,
Of Counsel.

Office Supreme Court U. S.
FILED
DEC 10 1898
JAMES H. McKENNEY
Clerk

No. 118.

Brief of Budd, Garland & Garland for Appellee.

Supreme Court of the United States.

Filed Dec. 10, 1898.

October Term, 1898.

NORTON MARSHALL, Appellant,

vs.

PETER T. BURTIS.

No. 118.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEE.

E. P. BUDD,
A. H. GARLAND,
R. C. GARLAND,
For Appellee.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

NORTON MARSHALL, Appellant,
vs.
PETER T. BURTIS. } No. 118.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEE.

This is an action brought by Burtis, appellee, against Marshall, in the District Court of the Third Judicial District of the Territory of Arizona for the county of Maricopa, to quiet title to lot 1 of Neahr's addition to the city of Phœnix. After usual proceedings of answer, testimony, and trial resulting in favor of Burtis, Marshall appealed to the Supreme Court of the Territory, and on hearing there, the judgment of the trial court was in all things affirmed. (Rec., 71.)

Besides the issues presented by Marshall's demurrer and answer (Rec., 4), he afterwards filed an amended answer, and made it a cross bill, attacking Burtis' deed as invalid, and asserting his right under a deed from the

party who had sold to Burtis some two years previously, and asked relief to set aside Burtis' claim and to establish his own.

The assignment of errors are numerous, but after all, they amount to little if any more than the single and simple assertion that the court erred in finding in favor of Burtis' claim and against Marshall (Rec., 77, 78), and we will not repeat them here, but address ourselves to the point upon the whole record, whether the court did err in giving relief to Burtis instead of to Marshall.

The case was contested most thoroughly by Marshall, as even after the judgment of the Supreme Court, he moved for a rehearing, and this was denied by the Supreme Court. (Rec., 73.) There appears to be no exception saved as to the denial of the petition for rehearing, and the party seems to have, so far as the record is concerned, been content; and there is no assignment of error on this point. So that, granting or refusing motions for new trials and rehearings being largely in the discretion of the court, it would seem there is nothing now before this court. The refusal of the Supreme Court of the Territory to grant a rehearing was the last act or judgment of that court, and there being no question on that presented here, it must be there is an end of the matter.

Steines *v.* Franklin Co., 14 Wall., 22—notes.

Should this position be held untenable, we must now turn to the bill of exceptions, and epitomize that, in order to get at the case in full. But before doing this,

let us observe the bill of exceptions (Rec., 12–68) in the District Court fails to show by averment or by implication that there was no other testimony before the trial court than that contained or set out in the bill of exceptions. This being true, the Supreme Court of Arizona was bound to presume in favor of the correctness of the entire proceedings and affirm the case, if for no other reason. And the absence of this in the bill of exceptions keeps up the presumption in this court, and an affirmance here is required.

Gilmer *v.* Higley, 110 U. S., 47;
Deery *v.* Cray, 5 Wall, 807.

Now to the facts, if we must look at them, as disclosed by the bill of exceptions. We will condense them:

It appears that some years ago David Neahr conveyed to his daughter, Mary Friday Neahr, the land in controversy, conditioned that she should not sell or dispose of the same till she arrived at the age of twenty-one years.

On the 14th day of October, 1892, Mary Friday Neahr conveyed the land to the appellee, having theretofore declared and represented to him that she was twenty-one years of age, and making the same declaration to the notary who took her acknowledgment to the deed. Burtis paid her in cash the full value of the land, the sum of fifteen hundred dollars. Burtis went into possession of the land. In October, 1894, Marshall appeared at the home of Mary Friday Neahr, at Yuma, and after days of coaxing, cajolery, and argument with her, pro-

cured a deed from her of the same land, for the miserable pittance of *one hundred dollars* cash and a promise to pay *two hundred* more when he "shall obtain peaceable possession and unclouded title to the land."

The deed to Burtis was of record. Not only did Marshall have constructive notice of the sale to Burtis but he actually knew of it, and he procured the deed to himself, as he alleged to Mary Neahr and her brother, Freeson, "for the purpose of getting even" on Burtis for purchasing the property in 1892 instead of letting him (Marshall) purchase it *at that time.*

It is conceded that Burtis paid full value for the land, and it is proved beyond question that Mary Neahr represented in October, 1892, that she became twenty-one years old in the month before. Marshall himself at that time believed her to be of age, because the testimony shows that he tried to make the purchase then, and was only prevented because Burtis offered a higher price.

But Marshall wanted to "get even." He desired to prostitute the machinery of the law that he might wreak vengeance on the man that outbid him when he tried to make the purchase in 1892. So, in October, 1894, he procured his deed from the girl. Here we do not find a vendor who, on arriving at full age, voluntarily repudiates a conveyance made by her in infancy, and sells the land for its full value to an innocent and *bona-fide* purchaser. Instead of that we find one who, even if she did not attain her majority till 1894, is satisfied completely and

absolutely with the sale she made in 1892, who declares time and again to Marshall that she is satisfied, that the land was "well sold," and that she has no desire to repudiate the Burtis deed; who does not declare at that time that she was not twenty-one in 1892. But Marshall tells her he can prove by a host of witnesses that she was not twenty-one in 1892, and that he wants her to make a deed to him so he can get even on Burtis, "who played him a dirty trick." (The aforesaid "dirty trick," according to Marshall's and Walker's testimony, being that Marshall wanted to borrow the money from Burtis in 1892 to purchase the land, but Burtis, instead of lending the money to make the purchase, bought the land himself.) The girl, apparently worn out with Marshall's begging for a deed, and tearful protestations that she was not twenty-one in 1892, took his hundred dollars and two-hundred-dollar note, payable in the dim future, and executed the deed to him. She afterward tendered back the money and the note, but he refused to accept it. (Rec., 51.) He then could have made himself "whole" on the transaction, got back his money and note, but he wanted "to get even." He wanted a law suit—and he got it! and we have seen how it prospered and thus far resulted.

One of the contentions made by appellant is that the weight of the testimony shows that Mary Neahr was not twenty-one years of age until September, 1894. Appellant rests his whole case on that proposition. A number of witnesses testified that Mary Neahr was twenty-one years of age in September, 1892, and a number,

composed largely of ignorant persons, who apparently knew no other date in the calendar of time than the year 1873, testified that this was the year in which she was born. One of them, Mrs. Muzzy, knew it because David Neahr boarded that year in her restaurant with his family. One of the Neahr boys contradicted her and declared that the family never boarded elsewhere than at their own home. Another of them, Mrs. Weber, testified that Mary Neahr was born in 1873, because her brother was born in that year, yet she clearly demonstrated on the witness stand that the father of the boy died two years before 1873. And so on down the list.

These witnesses all testified before the court; their testimony was not taken before a referee. The record shows that twenty-one witnesses were examined in the case. Weiger William Neahr, Purdy Freeson Neahr, Mr. Mussy, Mrs. Father Gheldorf, Mrs. Post, Mrs. Downey, Mrs. Silva, Mrs. McIntyre, Mrs. Conception Nailor, Townsend and Brinley testified in open court. There were only three witnesses who testified before the referee, and these testified on other matters.

The cardinal rule governing appellate courts is that where the evidence is conflicting the finding of the lower courts will not be disturbed, and the rule is even broader.

> "Where there is evidence to sustain the decision of the trial court the judgment will be affirmed, although the appellate court might have found otherwise if sitting as a trial court."
>
> Barry *v.* Coughlin, 90 Cal., 220.

The question as to when Mary Neahr arrived at the

age of twenty-one years depends upon the credibility of the various witnesses and the weight to be given to their testimony.

The appellate court will not pass upon the credibility of witnesses who have testified in the trial court.

Olevas *v.* Olevas, 61 Cal., 386;
Hardenburgh *v.* Bacon, 33 Cal., 356.

The rule obtains in equity cases as well as in trials at law.

Donahue *v.* Mariposa L. Co., 66 Cal., 317;
Ruter *v.* Stock, 12 Cal., 402;
Doe *v.* Vallejo, 29 Cal., 385;
Stockman *v.* Riverside Co., 64 Cal., 57.

So we maintain that the evidence as to the age of Mary Neahr being conflicting, this court will not in the exercise merely of its appellate jurisdiction attempt by perusing the transcript to weigh the evidence and retry this cause as though it were a trial court.

Even if Mary Neahr was not twenty-one years of age when she executed the deed to Burtis there are still unsurmountable obstacles in the way of a recovery by Marshall.

Mary Neahr received from Burtis the sum of fifteen hundred dollars for the land sold. She has not, neither has Marshall, returned or offered to return this sum of money or any part thereof. Marshall came into a court of equity and in his cross bill prayed its equitable interposition in its behalf. He seeks equity, but neither he nor his grantor have attempted to do equity. Not only

that he comes in naked of everything that would commend him to a court of equity, he is not an innocent or *bona-fide* purchaser. He took a deed from this girl and for it gave a sum that under his own showing was only one-tenth of the value of the land in 1894; and furthermore, he procured this deed for the avowed and determined purpose of making trouble, annoyance, expense, and cost and litigation to Burtis. Where are the "clean hands" here?

The consideration that Burtis paid should have been restored to him before he could be stripped of the land that he purchased from this girl under her representations that she was of age at the time she received it.

Kilgore *v.* Johnson, 17 Tex., 355;
Stuart *v.* Baker, 17 Tex., 421;
Bingham *v.* Barley, 40 Amer. Rep., 801;
Furgeson *v.* Houston R. Co., 11 S. W. Rep., 347;
Pemberton B. & L. Assn. *v.* Adams, 31 Alt. Rep., 280.

It is no answer to say that Mary Neahr had spent the fifteen hundred dollars and therefore can not return it.

> "It is stated by Chancellor Kent, and announced as a controlling doctrine in many, perhaps a majority of the States, that where a party under the plea of infancy, seeks to avoid an executed contract, he must restore the consideration which he has received. The rule, though broad, is nevertheless one which commends itself to most men as being founded in strict and impartial justice. Its tendency is to enforce honesty in transactions between individuals, and fully in consonance with oft-quoted principle

that the privilege of infancy is to be used as a shield and not as a sword; or in other words, that infancy may and should be protected, but should not be permitted to oppress or injure others. There are cases which apparently militate against the rule, but they are in conflict with the weight of authority and do not represent the now general received opinions of the courts of the country."

2 Warville on Vendors, page 874.

And the same learned author in writing on the proposition that if any infant has spent the consideration her obligation to return it ceases, uses this language:

"It is to be observed, however, that this rule, in most cases where it has been applied, is a rule of law and not of equity. The actions in a majority of cases cited in support of the rule were brought for a recovery of the consideration, the infant having previously elected to disaffirm, and the courts in several instances, while laying down the rule, intimate that if the infant sought a recession in a court of equity he would be required to refund the consideration, whether he had disposed of it or not before he arrived at lawful age."

Ib., page 875.

"An infant is not permitted in equity to enjoy the proceeds of a sale of his property and then repudiate the sale any more than an adult."

Goodman *v.* Winler, 64 Ala., 410, 437;

Commonwealth *v.* Sherman, 18 Penn. St., 346.

Even if Mary Neahr was not of age when she executed the deed to Burtis she represented herself to be so of age, and it was because of these representetions that Burtis,

purchased. Having induced Burtis to make this purchase she is estopped from avoiding the contract.

Pemberton B. & L. Assn. *v.* Adams, 31 Alt. Rep., 280;

Ryan *v.* Grownew, 28 S. W. Rep., 190;

1 Story Eq. Juris. (13th ed.), 385;

2 Pomeroy Eq. Jur. (2d ed.), 945.

In Smithheimer *v.* Eiseman, 7 Bush., 298, the infant made affidavit that she was of age and the purchaser was induced to accept her deed and part with his money, relying on the truthfulness of the facts, and the court said, "The Chancellor could give no relief to appellant without making himself a party to her iniquitous and fraudulent conduct."

Mary Neahr declared she was of age in October, 1892. She so declared to the notary who took her acknowledgment to her deed. She received the consideration, fifteen hundred dollars; she has not returned it. Could she be heard in equity to profit by her action in the premises? Can her grantee, Marshall, be in any better position, more especially as he had full, ample and complete knowledge of the sale to Burtis, and paid but a trifle for his deed and procured it for a wrongful and malicious purpose?

Further, we contend that Mary Neahr, even if she did not arrive at majority until 1894, ratified and confirmed the Burtis deed. If she was an infant in 1892 her deed was not void but merely voidable; there can be no question about that. Now, she could ratify by express words,

by acts and conduct, or by an omission to disaffirm within a reasonable time. Before she conveyed to Marshall by express words she ratified her deed to Burtis. She repeatedly declared that she was satisfied with her transaction with Burtis, that the land had been "well sold," thus clearly showing that she was willing to abide by her former action and not repudiate it. And she never would have repudiated if she had been let alone by Marshall.

> "In short, any word or action from which an infant's assent to the contract may be fairly deduced will be regarded as a confirmation."
>
> Cheshere *v.* Barrett, 17 Amer. Dec., 739.

> "Confirmation of a deed by an infant, which is voidable at his election, need not be by deed. Anything from which his assent after he arrives at age may be fairly inferred will be sufficient to ratify a deed made during infancy."
>
> Wheaton *v.* East, 36 Amer. Dec., 251.

In 2d Kent's Com. (Holmes' 13th ed.), 233–245 (star page), there is a full discussion of this whole subject—as to void and voidable acts of infants; confirming and avoiding contracts; restoration of consideration received if the contract is disaffirmed—and it sustains throughout what we contend for here.

See, also—

1 Parsons' Cont. (8th ed.), 318–323;

Ib., 345–357;

Irvine *v.* Irvine, 9 Wall., 617.

There is nothing further in appellant's assignment of errors that requires any notice, and in conclusion we

maintain that the equities are all with the appellee; he purchased for full value, under the representation of Mary Neahr that she was of full age in 1892, and she herself so testifies that she was of full age in 1892. (Rec., 48–51.) The consideration was not returned to Burtis. He should not be deprived both of his money and his land at the behest of Marshall, who is not a *bona-fide* purchaser; who is not a purchaser for value; who had actual notice of the sale to Burtis; who procured his deed in bad faith; who is attempting to make a court of equity the instrumentality of venting his malice and spleen and spite on Burtis for the purpose of "getting even on him." And the only excuse he gives for this is that Burtis did wrong in purchasing the land in 1892 instead of then lending him money to make the purchase. The testimony shows that Burtis took no advantage of him, for Mary Neahr testified (Transcript, 244) that Burtis wrote to her about purchasing the land before Marshall had agreed to take it. (Rec., 48–51.)

After all, look at it as we may, this is an appeal from the finding on a question of fact: Was Burtis' grantor twenty-one years of age when she executed the deed to him? The trial court so found, and the Supreme Court of Arizona affirmed this finding. This court will not review cases coming up from the Territories on questions of fact. Authorities on this are most numerous, but we will cite only a few of the more recent ones:

Harrison *v.* Perea, 168 U. S., 311;

Karrick *v.* Hannaman, *ib.*, 328;

Holloway *v.* Dunham, 170 U. S., 615;

Young *v.* Amy (decided by Mr. Justice White, May 31, 1898);

William Naeglin and others *v.* Doloritas Martin de Cordoba and others (decided by Mr. Justice Brewer, October 24, 1898).

It is most respectfully submitted, that in any view of this case, the judgment of the Supreme Court of Arizona should be affirmed.

E. P. Budd,
A. H. Garland,
R. C. Garland,
For Appellee.

MR. JUSTICE FULLER dissented.

MARSHALL *v.* BURTIS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 118. Submitted January 10, 1899. — Decided January 30, 1899.

As there was no finding of facts by the courts below, and no statement of facts in the nature of a special verdict, this court must assume that the judgment of the court below was justified by the evidence, and affirm the judgment of the Supreme Court.

Opinion of the Court.

THE case is stated in the opinion.

Mr. L. E. Payson for appellant.

Mr. A. H. Garland and *Mr. R. C. Garland* for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a suit to quiet title to a lot in the city of Phœnix, Arizona, described as lot 8 in block 1 in Neahr's addition to said city. The appellee was plaintiff in the court below and the appellant was defendant, and we shall so designate them.

The plaintiff alleged that he was in possession as owner in fee, deriving it from one Friday Neahr, commonly known as Mary F. Neahr, an unmarried woman, over twenty-one years of age, by a deed dated October 14, 1892. That the defendant, contriving to defraud him (the plaintiff) and cloud his title to the property, induced said Friday Neahr, by false and fraudulent pretences, and without consideration, to sign and acknowledge an instrument in writing, the contents of which were unknown to her, which instrument was a conveyance to him from her of the property, and in which she was induced to fraudulently state that she was not of lawful age when she executed the deed to the plaintiff, and that said instrument was recorded in the office of the county recorder of Maricopa County, "all to the great injury of this plaintiff in the sum of five thousand dollars." Judgment was prayed that the instrument to Marshall be delivered up and cancelled, and that plaintiff have damages in the sum of five thousand dollars, and for general relief.

The answer admits that Friday M. Neahr was seized in fee of the property, and executed a deed therefor to the plaintiff, and that he entered into and was in possession thereof, and that he (the defendant) obtained a deed therefor on the 25th day of October, 1894.

The answer puts in issue all other averments, and alleges by way of cross complaint that when Friday M. Neahr executed the deed to plaintiff she was under twenty-one years, to

wit, nineteen years, which plaintiff knew. That Friday M. Neahr derived the property from her father by a deed of gift, in which it was expressly provided and limited that she should have no power of disposition of said premises until she arrived at the age of twenty-one years, which plaintiff knew. That she attained the age of twenty-one on the 7th of September, 1894, and on the 24th of October, 1894, she "executed, acknowledged and delivered to this defendant, for a valuable consideration, then and there paid to her by the defendant, a deed of conveyance in writing, with full covenants of seisin and warranty, conveying to this defendant the lands and premises described in the plaintiff's complaint herein, and therein and thereby said Friday M. Neahr expressly revoked and disaffirmed the aforesaid attempted conveyance of said premises to the plaintiff, and this defendant thereupon became, ever since has been, and now is the lawful owner of said premises and the whole thereof, and entitled to possession thereof; that said plaintiff has no right, title, claim or interest whatsoever in said premises, and the claim of the plaintiff to ownership thereof is without foundation and against the rights of this defendant, and is a cloud upon the title of this defendant to the said premises." Wherefore the defendant prayed that the deed to plaintiff be declared invalid and he be enjoined from setting up any claim to the property, and that defendant be adjudged the owner.

A trial was had on these issues before the court without a jury, and judgment was given for the plaintiff.

The judgment recited that —

"Evidence upon behalf of the respective parties was introduced and the cause was submitted to the court for its consideration and decision, and, after due deliberation, the court orders that plaintiff have judgment.

"Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff Peter T. Burtis is the owner of the following described real estate, situate in Maricopa County, Arizona Territory, to wit,

(Describing it);

and that said defendant Norton Marshall is not the owner of

said lot number eight (8), in block number one (1), of Neahr's addition or of any part thereof, and that the deed of said premises heretofore executed by Friday Mary Neahr to said Norton Marshall, of date October —, 1894, and recorded on the 29th day of October, 1894, in book 37 of deeds, page 55, in the office of the county recorder of said county of Maricopa, is invalid and of no effect, and the same is hereby annulled and cancelled, and the said defendant Norton Marshall has acquired no claim, title or right by virtue of said deed in or to the premises described therein, to wit, said lot number eight (8), in block number one (1), of said Neahr's addition to the city of Phœnix, and said defendant is hereby forever restrained and enjoined from asserting any claim or title to said premises or any part thereof by virtue of said deed.

"And it is further ordered, adjudged and decreed that said defendant Norton Marshall take nothing by his cross-complaint filed herein, and that said plaintiff Peter T. Burtis do have and recover of and from the said defendant Norton Marshall his costs and disbursements herein, taxed at $53.30."

A motion for a new trial was made and denied, and an appeal was then taken to the Supreme Court of the Territory, which affirmed the judgment of the district court. To review the judgment of the Supreme Court this appeal is prosecuted.

There are fourteen assignments of error, some of which attribute error to the judgment, some to the supposed finding of the court of the validity of the deed to plaintiff and invalidity of that to defendant, and assigning ownership of the property to the former and non-ownership to the latter. The second and third assignments of error are as follows:

"2. The said court erred in refusing to sustain the errors assigned on the appeal to it from the district court.

"3. The said court erred in refusing to reverse the said cause for the errors of the district court assigned."

Adverting to the errors assigned on appeal to the district court, those which were based on the action of the court other than the judgment were in refusing a new trial and "generally in admitting improper evidence offered by the

plaintiff, to which the defendant duly objected and took exception, as appears fully in the bill of exceptions."

There is no other specification of error in the admission of testimony and there is no specification in the briefs as required by rule 21. *Lucas* v. *Brooks*, 18 Wall. 436; *Benites* v. *Hampton*, 123 U. S. 519. Indeed, error on admitting testimony is not urged at all and probably was not intended to be. The statement of counsel is:

"The errors assigned reach every possible phase of the case, and need not be specifically referred to here.

"The judgment appealed from, being general, requires an analysis of the case.

"The only possible questions may be said to be —

"1. That Neahr was of full age when she made the deed to Burtis, October 14, 1892.

"2. If not, that she failed to disaffirm within a reasonable time after attaining her majority.

"3. That she ratified her deed to Burtis before deeding to Marshall and after attaining majority.

"4. That she was estopped to disaffirm, by her own act, in averring her majority in executing the Burtis deed.

"5. That she was bound to restore the consideration to Burtis before an effective disaffirmance.

"6. That Marshall, knowing the prior deed to Burtis, could not take title to himself in October, 1894.

"The first three propositions present purely questions of fact, and upon this record it is impossible that the court below could have based its judgment upon an affirmance of either of the three.

"The last three propositions present solely questions of law, and these it is confidently submitted are only to be resolved in favor of appellant."

We are not required, therefore, to review the rulings of the district court on admission or rejection of testimony. Does the record present anything else for our determination? In *Idaho & Oregon Land Improvement Co.* v. *Bradbury*, 132 U. S. 509, this court said, by Mr. Justice Gray, that "Congress has prescribed that the appellate jurisdiction of this court over

'judgments and decrees' of the territorial courts, 'in cases of trial by juries shall be exercised by writ of error, and in all other cases by appeal;' and 'on appeal instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below,' and transmitted to this court with the transcript of the record. Act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28. The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite, 'We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us.' *Hecht* v. *Boughton*, 105 U. S. 235, 236." See also *Salina Stock Co.* v. *Salina Creek Irrigation Co.*, 163 U. S. 109; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303; *San Pedro & Cañon Del Agua Co.* v. *United States*, 146 U. S. 120; *Mammoth Mining Co.* v. *Salt Lake Foundry and Machine Co.*, 151 U. S. 447.

There was no finding of facts by the district court or by the Supreme Court, hence no "statement of facts in the nature of a special verdict," and we must assume that the judgment of the district court was justified by the evidence, and the judgment of the Supreme Court sustaining it is

Affirmed.